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XINGFEI LUO, IN PRO PER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

XINGFEI LUO, Petition, vs. THE PEOPLE OF CALIFORNIA, Respondent.	Case No.: 8:22-cv-01640-MEMF-KES **OBJECTIONS TO REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE** Action Filed: September 6, 2022

TO THE COURT AND ALL PARTIES:

Xingfei Luo (Petitioner) will and hereby does object to the Report and Recommendations ("R&R") of Magistrate Judge in this matter.

ARGUMENT

By clear and convincing evidence, Petitioner has demonstrated that Czodor is a calculated manipulator and no reasonable factfinder would have convicted her of the crimes charged.

GROUNDS TWO, EIGHT, NINE, NINETEEN THROUGH TWENTY-TWO, TWENTY-FIVE, TWENTY-NINE, AND THIRTY ARE NOT PROCEDURALLY BARRED (Dkt. 73 at 13)

Procedural Default Based on Failure to Raise on Direct Appeal

The magistrate found Petitioner's enforcement-of-the-protective-order claim (ground two) is

procedurally defaulted because it could have been raised on direct appeal but was not. Dkt. 73 at 16. However, jurisdictional issues or claims that render a judgment void can be raised on habeas review. As established in *In re Harris*, 5 Cal. 4th 813, 829 (1993), claims that demonstrate that a court acted without jurisdiction, or that a judgment is void due to constitutional infirmities, are not subject to the procedural default bar.

The magistrate found Petitioner's prosecutorial-misconduct claims (ground thirty) and independent Fifth Amendment challenge to the admission of her family-court testimony (ground nine) are procedurally barred because she did not raise them on direct appeal. Dkt. 73 at 16-17. This is factually false. See attachment 1.

The magistrate found an independent and adequate state procedural ground barring Petitioner's sufficiency-of-the-evidence claims in grounds nineteen through twenty-two because the state court denied those claims because they were not cognizable on habeas review. Dkt. 73 at 17.

Under federal law, claims regarding the sufficiency of the evidence are inherently tied to due process rights, specifically the guarantee that no individual will be convicted of a crime unless the prosecution has proven every element of the offense beyond a reasonable doubt.

The U.S. Supreme Court, in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), articulated the standard for evaluating sufficiency-of-the-evidence claims in the context of due process. The Court held that a conviction violates due process if, after reviewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This means that when a defendant challenges the sufficiency of the evidence, they are essentially asserting that their due process rights have been violated because the evidence presented at trial was not sufficient to meet the required constitutional standard.

The Jackson standard is the federal benchmark for sufficiency-of-the-evidence claims. Under this standard, the reviewing court does not weigh the evidence, resolve conflicts in testimony, or assess the credibility of witnesses. Instead, the court must determine whether any rational factfinder could have reached the conclusion that the defendant was guilty beyond a reasonable doubt. If not, the conviction cannot stand because it violates due process.

Sufficiency-of-the-evidence claims are inherently due process claims because the right to be

convicted only upon proof beyond a reasonable doubt is a fundamental constitutional protection. The Supreme Court in *In re Winship*, 397 U.S. 358, 364 (1970), affirmed that the Due Process Clause requires the prosecution to prove every element of a charged offense beyond a reasonable doubt. When a court is asked to review the sufficiency of the evidence, it is reviewing whether this constitutional standard has been met. Under the *Winship* decision, it is clear that a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim. *Jackson v. Virginia*, 443 U.S. 307, 321 (1979).

If a conviction is based on insufficient evidence, the defendant's due process rights have been violated, as the conviction would have been obtained without meeting the burden of proof that the Constitution mandates.

On federal habeas corpus review, sufficiency-of-the-evidence claims are also considered due process claims under 28 U.S.C. § 2254. The reviewing court asks whether the state court's decision was contrary to or an unreasonable application of *Jackson*. Federal courts defer to the findings of the state court, but if the evidence is constitutionally insufficient, the habeas petition will be granted on due process grounds.

In this case, a rational trier of fact could not have reasonably found that Petitioner and Czodor were in a dating relationship based on only two social gatherings and limited interactions. Federal law requires more than mere speculation for a finding to meet the "beyond a reasonable doubt" standard.

As to Czodor's expectation of privacy in sending nude photos after meeting Petitioner once, the U.S. Supreme Court in *Katz v. United States*, 389 U.S. 347, 361 (1967), established that the reasonable expectation of privacy must be evaluated objectively, meaning it depends on what society is prepared to recognize as reasonable—not the subjective beliefs of the individual. A reasonable person does not expect privacy in such a context, particularly given the absence of a clear, established relationship, the lack of promise by Petition to keep the photos private, and the voluntary transmission of the photos.

Furthermore, in order to secure a conviction under California Penal Code § 647(j)(4)(A), the

prosecution must prove that the alleged victim suffered "serious emotional distress" as a result of the offense. Dkt. 3 at 160.

In California, "serious emotional distress" must be more than mere discomfort or temporary upset. For instance, in *People v. Ewing* (1999) 76 Cal.App.4th 199, the court explained that while the terms "substantial emotional distress" and "severe emotional distress" are similar, they are not synonymous because "severe" is a stronger adjective than "substantial." *Id* at 211. The court further explained: the prosecution presented only scant evidence of emotional distress. Ferguson testified that beginning the night of April 14 she feared Ewing; she was afraid for her own safety and that of her children. It was Ewing's conduct that evening that prompted Ferguson to make her first telephone call to the police department. Two days later, Ewing was arrested. Before the evening of April 14, there was no evidence that Ferguson feared Ewing. Ferguson's boyfriend, Goulding, testified she suffered sleepless nights and had joined a support group for battered women. While this evidence supports the conclusion that Ewing's conduct upset Ferguson, it fell far short of showing Ferguson suffered **substantial emotional distress**. No evidence was proffered as to the degree, frequency and duration of Ferguson's sleep disruption. Similarly, Goulding's statement Ferguson joined a support group, without further details as to the extent of her participation, adds little. Indeed, there was not even a showing that Ferguson, who had organized a foundation for battered women before meeting Ewing, joined the support group as a result of Ewing's conduct. Without evidence as to the severity, nature or extent of a victim's emotional distress, the burden of proof is not met. *Id*. at 211-212.

In the present case, the evidence offered by the prosecution is even weaker than in *Ewing* – a case required evidence of substantial instead of serious emotional distress. Here, Czodor testified only that he "thought about going to therapy a lot" without providing any further details about the emotional or psychological impact of the alleged conduct. There was no testimony or corroborating evidence of Czodor actually suffering from prolonged anxiety, or any other tangible impact resulting from the incident. Under the standard set in *Ewing*, where even evidence of sleepless nights and support group participation fell short of proving substantial emotional distress, Czodor's testimony that he thought about going to therapy is constitutionally insufficient to meet the burden

of proof required for serious emotional distress.

As the court in *Ewing* emphasized, the prosecution must provide more than just scant evidence of emotional distress; it must show its severity, frequency, and duration. Without such evidence, the claim of substantial emotional distress cannot be sustained, and the prosecution fails to meet the requisite legal standard to secure a conviction.

California's Civil Code section 1708.85, which deals with privacy rights related to unauthorized use of intimate images, requires that the distress be "serious" and supported by evidence such as therapy, substantial mental health impact, or a significant disruption in the victim's life. Merely thinking about going to therapy would not meet this standard.

Exceptions to Procedural Bar

A reviewing court ordinarily will not consider a habeas claim which could have been but was not raised on direct appeal (the "*Dixon* rule"). *In re Dixon* (1953) 41 Cal.2d 756, 759.

The exceptions to the *Dixon* rule are: (1) fundamental constitutional error; (2) lack of jurisdiction over the petitioner; (3) the trial court acting in excess of its jurisdiction; or (4) an intervening change in the law. See *Park v. California*, 202 F.3d 1146, 1152 (9th Cir. 1999) (listing the exceptions to the *Dixon* rule as set forth by the California Supreme Court in *In re Harris*, 5 Cal. 4th 813, 828 n.7 (1993)).

Because Petitioner's claims alleged federal constitutional error, *Dixon* is not an independent bar as applied to those claims and her claims are not procedurally defaulted. *Park v. California*, 202 F.3d 1146, 1154 (9th Cir. 1999).

Petitioner contends that the trial court enforced two void family court orders, which means the trial court had no legitimate authority or fundamental jurisdiction over Petitioner. This argument invokes a critical exception to the *Dixon* rule.

Under California law, a court's jurisdiction is a fundamental prerequisite for any valid judgment or order. A court acts in excess of its jurisdiction when it enforces void orders, and any such action is null and void ab initio. The California Supreme Court has long recognized that a judgment rendered by a court that lacks jurisdiction over the subject matter or the parties is void and can be challenged **at any time**, even collaterally. As established in *In re Harris*, 5 Cal. 4th 813,

836-837 (1993), and *People v. American Contractors Indemnity Co*., 33 Cal. 4th 653, 661 (2004), a court's jurisdictional overreach renders its orders and judgments void and subject to collateral attack, even in habeas corpus proceedings.

Moreover, under Federal law, it is well-established that a court's actions in the absence of jurisdiction are void and can be challenged at any time. The United States Supreme Court has consistently held that a judgment is void and subject to collateral attack if the court that rendered it acted without jurisdiction. In *United States v. Cotton*, 535 U.S. 625, 630 (2002), the Supreme Court emphasized that "subject-matter jurisdiction...can never be forfeited or waived," and that a judgment rendered without jurisdiction is void.

Because Petitioner has alleged that the trial court enforced void family court orders, the trial court acted beyond its jurisdiction. Consequently, Petitioner's claim falls within the exception to the *Dixon* rule, allowing Petitioner to challenge the trial court's jurisdiction in a habeas corpus proceeding despite the claim not being raised on direct appeal.

Procedural Default Based on Failure to Object at Trial

In *Ylst v. Nunnemaker*, 501 U.S. 797, 799, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991), the state appellate court held on direct appeal that Nunnemaker had waived his *Miranda* claim because he failed to object at trial. Nunnemaker re-raised his *Miranda* claim in several subsequent state habeas petitions, all of which were denied essentially without explanation. The issue before the United State Supreme Court was "whether the California Supreme Court's unexplained order denying his second state habeas petition to that court ... constituted a 'decision on the merits' of that claim sufficient to lift the procedural bar imposed on direct appeal." *Nunnemaker*, 501 U.S. at 801, 111 S.Ct. 2590. Although the Supreme Court concluded that an unexplained order did not constitute a decision on the merits, it noted that:

> State procedural bars are not immortal, however; they may expire because of later actions by the state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available. Id.

Here, because petitioner reasserted his Brady /false evidence claim in his first state habeas

petition and the state supreme court reached (and rejected) the merits of that claim, *Nunnemaker* applies and the procedural bar based on the contemporaneous objection rule for petitioner's knowing presentation of false evidence claim has been lifted.

Cause and Prejudice (Dkt. 73 at 20)

Ineffective assistance of counsel claims are not subject to the strictest procedural forfeiture rules. See *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 689-90 (1984)). In *Harrington*, the Court explained that:

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve.

Id.

"If the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." *Murray v. Carrier*, 477 U. S. 478, 488 (1986). That is not because a constitutional error "is so bad that the lawyer ceases to be an agent" of the prisoner, but rather because a violation of the right to counsel "must be seen as an external factor" to the prisoner's defense. *Coleman v. Thompson*, 501 U. S. 722, 754 (1991) (internal quotation marks omitted).

A court "must consider the totality of the evidence" and ask "whether there is a reasonable probability that, absent the [trial counsel's] errors, the result of the proceeding would have been different" when evaluating a claim of ineffective assistance of counsel.

"A reasonable probability is a probability sufficient to undermine confidence in the outcome. That requires a substantial, not just conceivable, likelihood of a different result." Pinholster, 563 U. S., at 189 (citation and internal quotation marks omitted). This standard does not require a defendant to show that it is more likely than not that adequate representation would have led to a better result, but "[t]he difference" should matter "only in the rarest case." Strickland, 466 U. S., at 697. To determine whether a prisoner satisfies this standard, a court must "consider the totality of the evidence before the judge or jury." Id., at 695. The magistrate departed from these well-established rules in at least three ways. First, she failed adequately to take into account the

weighty exculpatory evidences in this case. As noted, the magistrate did not mention those evidences at all.

Determining whether evidence would have created a reasonable probability of a different result if it had been offered at trial necessarily requires an evaluation of the strength of that evidence. And where that evidence undermines the prosecution's theory, it is hard to see how a court could decide how much weight to give the evidence without making a comparative analysis. The weakness of Czodor's testimony contrasts sharply with the strength of the evidence that destroyed his credibility.

When a prisoner claims that he was prejudiced at trial because counsel failed to present available mitigating evidence, a court must decide whether it is reasonably likely that the additional evidence would have avoided a conviction. This analysis requires an evaluation of the strength of all the evidence and a comparison of the weight of each evidence. The magistrate downplayed Petitioner's evidence present here and overstated the strength of trial evidence.

Appellate Counsel (Dkt. 21)

The magistrate found that Petitioner's first habeas petition she filed in the state supreme court asserted numerous ineffective-assistance-of-trial-counsel claims (see Dkt. 6 at 65-83) but no corresponding ineffective-assistance-of-appellate counsel (IAAC) claims. Dkt. 73 at 21-22. This finding overlooks the fact that Petitioner's first state court habeas petition was filed on October 13, 2021 which was before her appellate counsel filed a *People v. Wende* (1979) 25 Cal.3d 436 brief on February 17, 2022. Dkt. 5 at 9. Therefore, Petitioner could not raise IAAC claims because her first state court habeas petitioner was filed before her appellate counsel filed *Wende* brief.

The magistrate found that Petitioner did not exhaust her ineffective-assistance-of-appellate-counsel (IAAC) claim because, in her second habeas petition to the California Supreme Court, she only vaguely alleged that she "received zero assistance of counsel on appeal," which was presumably based on the fact that appellate counsel filed a *People v. Wende* (1979) 25 Cal.3d 436 brief. The magistrate determined that Petitioner failed to identify specific claims that appellate counsel should have raised. Dkt. 73 at 21-22.

However, since Petitioner is proceeding pro se, courts are charged with construing her

Petition and filings liberally in order to allow for the development of a potentially meritorious case. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Martin v. Duffy*, 858 F.3d 239, 245 (4th Cir. 2017) (noting that "when confronted with the objection of a pro se litigant, [the court] must also be mindful of [its] responsibility to construe pro se filings liberally"). In addition, Petitioner relied on the Court's initial review to exhaust her claims but nowhere in the Court's initial review alerts her that the IAAC was unexhausted. Therefore, her IAAC claim is not procedurally barred. See *Walters v. McCormick*, 122 F.3d 1172, 1174 n.1 (9th Cir. 1997) (exhaustion requirement excused because failure to exhaust partially due to district court's ruling that claims were not barred, which allowed statute of limitations to expire.)

Here, the nature of the ineffective assistance claim necessarily shows that the appellate attorney's failure to raise any appropriate issues, except those that rely on evidence outside the record, constituted deficient performance. (See Ground 2, 3, 8, 9, 10, 12-15, 17-22, 24-31, and 35. It is self-evident that Petitioner asserts that all claims except those relying on evidence outside the record are claims that appellate counsel should have raised, thus rendering the magistrate's conclusion factually and legally incorrect.

Nominal representation on an appeal as of right — like nominal representation at trial — does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all. *Evitts v. Lucey*, 469 U.S. 387, (1985). The attorney must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim. See *Anders v. California*, 386 U.S. 738 (1967); see also *Entsminger v. Iowa*, 386 U.S. 748 (1967) (emphasizing that an attorney must assist a defendant in presenting claims and legal arguments effectively, particularly in appeals where the right to counsel is guaranteed.)

In the context of ineffective assistance of appellate counsel, failure to raise meritorious claims, especially those that could be preserved for federal habeas proceedings, can constitute ineffective assistance. If appellate counsel fails to preserve claims for federal habeas proceedings, resulting in the application of the highly deferential standard of review, such failure typically meets the *Strickland* standard for ineffective assistance, as it directly impacts the ability of a defendant to

obtain meaningful relief in federal court. See *Anders v. California*, 386 U.S. 738, 744 (1967) (holding that counsel has fulfilled his duty of advocate if he files a brief referring to anything in the record that may support an appeal if he in good faith concludes the appeal is without merit.)

The Domestic-Violence Protective Order (ground two) (Dkt. 73 at 23)

The magistrate found that appellate counsel could not have performed unreasonably in declining to assert a claim because trial counsel stipulated that the protective order was valid. Dkt. 73 at 23. This is legally flawed.

It is black letter law that fundamental jurisdiction may not be conferred by waiver, estoppel, or consent. *People v. Lara*, 48 Cal.4th 216, 227 (Cal. 2010). This principle is similarly enshrined in federal law. The consent of the parties is irrelevant. *California v. LaRue*, 409 U.S. 109 (1972). No action of the parties can confer subject-matter jurisdiction. *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 (1982). A party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. *Id*.

California law specifically restricts the issuance of domestic violence restraining orders (DVROs) to cases where the parties share a "qualifying" relationship under the Domestic Violence Prevention Act (DVPA). Under California Family Code § 6211(c), a DVRO requires a close or intimate relationship, such as dating or cohabitating, between the parties. If the relationship does not meet these statutory qualifications, the family court lacks subject matter jurisdiction to issue the order.

Orders issued without proper jurisdiction are legally void and may be challenged at any stage. California courts recognize that a void order is "a nullity" and can be attacked in any proceeding where its validity is at issue. *County of Ventura v. Tillett*, 133 Cal. App. 3d 105, 110 (1982), explains that a void order has no legal effect and may be challenged regardless of prior stipulations. Subject-matter jurisdiction involves a court's power to hear a case, it can never be forfeited or waived. *United States v. Cotton*, 535 U.S. 625, (2002). Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in trial court. See, e.g., *Louisville Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908).

Appellate counsel's failure to raise a jurisdictional issue amounts to ineffective assistance

under *Strickland v. Washington*, 466 U.S. 668 (1984), and this omission results in prejudice. Given that jurisdictional arguments are non-waivable and central to the validity of court orders, appellate counsel's neglect to assert this issue, especially on appeal, constitutes deficient performance. Furthermore, in California, appellate courts have recognized that issues impacting jurisdiction—especially those that affect the fundamental fairness of the proceedings—require heightened scrutiny.

Under *Smith v. Robbins*, 528 U.S. 259, 285 (2000), appellate counsel has a duty to pursue meritorious claims that affect the legitimacy of any court orders that resulted in Petitioner's conviction. Because the family court's jurisdiction is essential to the validity of restraining orders, any deficiencies in jurisdiction should have been raised by appellate counsel to protect Petitioner's rights.

In addition, trial counsel's decision to stipulate to the validity of the family court's protective order, despite having knowledge that the alleged facts would not legally support a dating relationship, constitutes ineffective assistance of counsel, which is a colorful claim that should have been raised by appellate counsel.

Here, trial counsel's decision to stipulate to the validity of the family court order falls below the objective standard of reasonableness, as it was based on the rejection of a legal argument by the trial court rather than a legitimate strategic decision. Dkt. 3 at 250-251. See *U.S. v. Swanson*, 943 F.2d 1070, 1071 (9th Cir. 1991) (holding that counsel's abandonment of his client's defense caused a breakdown in our adversarial system of justice.)

The stipulation effectively deprived the jury—the appropriate fact-finder—of its role in determining whether the interactions between Petitioner and Czodor met the legal standard of a dating relationship and whether Czodor had a relationship engendering expectation of privacy.

A stipulation is a binding agreement that removes the need for the government to present evidence to prove certain facts. When defense counsel agrees to a stipulation, it prevents the jury from hearing critical evidence that might have influenced its decision. Stipulations should be considered as strategic tools, but they must be based on sound legal grounds. In this case, the stipulation concerning the family court's orders deprived Petitioner of her Sixth Amendment right

to a jury trial on a key factual issue—whether there was a dating relationship, a required element for the issuance of the protective orders and of the expectation of privacy. By stipulating to the validity of the orders, trial counsel waived this essential right, and this waiver was not made in furtherance of any legitimate strategy, as the facts and evidence simply did not support a dating relationship. This failure meets both the deficient performance and prejudice prongs of *Strickland*.

The magistrate's conclusion that Petitioner is bound by counsel's stipulation (Dkt. 73 at 24), regardless of her knowledge or authorization, is legally flawed under federal law. While defense counsel has authority over certain trial-related decisions, such as the strategic use of evidence or stipulations, this authority is not absolute, particularly when it comes to fundamental rights.

Certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. *Florida v. Nixon*, 543 U.S. 175, 187 (2004). A defendant has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his' or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Wainwright v. Sykes*, 433 U.S. 72, 93, n. 1 (1977) (Burger, C. J., concurring). As explained above, trial counsel's stipulation effectively waived Petitioner's right to a jury determination of crucial facts, a waiver that counsel did not have the authority to make. Waiving this right without Petitioner's informed consent constitutes a violation of both the Sixth and Fourteenth Amendments. Therefore, the magistrate's conclusion that Petitioner is bound by her counsel's unauthorized stipulation is legally flawed and Petitioner is entitled to habeas relief. See *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993) (habeas relief is automatically granted for constitutional errors that are "structural defects"); *Wash. v. Recuenco*, 548 U.S. 212, 218-19 (2006) (structural error "necessarily render[s] a criminal trial fundamentally unfair or [] unreliable vehicle for determining guilt or innocence"); *Miller v. Dormire*, 310 F.3d 600, 604 (8th Cir. 2002) (attorney's waiver of defendant's right to jury trial without defendant's consent or understanding constituted structural defect).

In *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), "the Supreme Court created an exception to the *Strickland* standard for ineffective assistance of counsel and acknowledged that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be presumed." *Stano v. Dugger*, 921 F.2d 1125, 1152 (11th Cir. 1991) (en

banc).

The Supreme Court recognized in *Cronic* that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658, 104 S.Ct. at 2046. The Court identified the complete denial of counsel or the deprivation of effective representation at a critical stage of an accused's trial as justifying a presumption of prejudice. Id. at 659, 104 S.Ct. at 2047. The Supreme Court stated that

> [c]ircumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

Id. at 659-60, 104 S.Ct. at 2047.

By stipulating with the prosecution, prejudice was presumed, because of an actual or constructive denial of the assistance of counsel during a critical stage of the criminal proceedings. See *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.").

The Government has failed to identify any strategy that can justify trial counsel's stipulation. "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." *Cronic*, 466 U.S. at 656-57 n. 19, 104 S.Ct. at 2045-46 n. 19. By stipulating with the prosecution, trial counsel shouldered part of the Government's burden of persuasion.

Trial counsel's stipulation with prosecution demonstrates the constructive absence of an attorney dedicated to the protection of his client's rights under our adversarial system of justice. Trial counsel's stipulation with prosecution was not a tactical admission of certain facts in order to persuade the jury to focus on an affirmative defense such as insanity. See *Duffy v. Foltz*, 804 F.2d 50, 52 (6th Cir. 1986) (counsel's admission that his client committed the acts alleged but that he was not guilty by reason of insanity considered to be a trial tactic). Here, the stipulation told the jury that no reasonable doubt existed as to the validity of family court orders issued based on the dating

relationship between Petitioner and Czodor where whether a dating relationship existed was a key fact to determine whether the family court had jurisdiction to issue the restraining orders and whether Czodor had reasonable expectation of privacy in the photos he sent to Petitioner. Such stipulation was not merely a negligent misstep in an attempt to champion his client's cause. See *U.S. v. Swanson*, 943 F.2d 1070 (9th Cir. 1991).

Prosecutorial misconduct (grounds eight and thirty) (Dkt. 73 at 25)

The magistrate incorrectly characterized ground eight as prosecutorial misconduct. Dkt. 73 at 25. Ground eight involves the use of perjured testimony or false evidence at trial, which violates Petitioner's right to a fair trial under Due Process Clause of the Fourteenth Amendment.

Czodor testified that Petitioner visited his home at night –when it would have been dark outside – and that he claimed to have noticed the damage to his door the next day. This is a classic manipulation - use assumption instead of actual objective evidence. Whether outside was dark is irrelevant. The relevant question is whether Czodor's front door area was dark. Czodor's claim that he only discovered the damage the next day is suspicious, especially given the evidence that his front door area was well-lit. His explanation that it was "too dark" to notice the damage is inconsistent with the facts, as photographs show the area was sufficiently illuminated. The fabricated darkness and damage are an attempt to make his story of Petitioner's alleged misconduct more believable and to provide a basis for seeking legal recourse. In cases where a party's testimony is contradicted by objective evidence, courts often question the credibility of the testimony.

Here, Czodor's credibility was a key issue in the case, and his testimony about the damage to the door directly affected the jury's determination of Petitioner's guilt. The fact that he fabricated an excuse for not noticing the damage sooner undermines his credibility and suggests that his testimony about other events may also be false. This false testimony was material because it directly affected the jury's assessment of the facts and the ultimate decision in the case. Had Petitioner caused the damage, Czodor would not need to fabricate a story about the darkness to explain the delay in his discovery of the damage. See *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) (holding that "[t]he jury's estimate of the truthfulness and reliability of a given

witness may well be determinative of guilt or innocence").

The magistrate has misrepresented and ignored evidence presented by Petitioner, particularly regarding the lighting conditions at Czodor's front door. The magistrate's finding that Petitioner presents no evidence to show that Czodor's statement about being dark was false is not only inaccurate but also disregards the evidence that contradicts Czodor's testimony. Dkt. 73 at 26-27.

Here, the magistrate's conclusion that Petitioner provided no evidence to counter Czodor's testimony is demonstrably false. Petitioner presented photographs showing that the front door area was well-lit, which undermines Czodor's claim that he did not notice the damage until the following day due to darkness. Dkt. 6 at 159-163. The magistrate's dismissal of these photos based on the lack of a visible light bulb is irrelevant and constitutes a misrepresentation of the evidence. The proper inquiry should have been whether the lighting was sufficient to notice the damage, not whether the light bulb was visible.

The magistrate's finding that nothing suggests that it was so bright that it would have been impossible for the victim to not notice the damage to the door is an unreasonable interpretation of the evidence and a misrepresentation of what the photographs actually depict. Photographic evidence demonstrates that light illuminated the entire front door area, strongly indicating a high level of visibility at the time the photos were taken. The magistrate's assertion that the door was "mostly covered in shadow" is incorrect when considering the clear, documented lighting on the front entryway, which should have made any substantial damage readily apparent.

Here, the magistrate's interpretation of the lighting conditions does not align with the visual evidence, undermining the credibility of the factual conclusions drawn. Therefore, the magistrate's conclusion lacks evidentiary support.

Czodor's testimony that it was too dark to notice the damage to his door on September 18, 2018 is central to the prosecution's case. However, the photographic evidence submitted by Petitioner, which shows significant lighting at the front door, directly contradicts Czodor's account. Even people with poor eyesight can see the damages on the door if any. In addition, Czodor's ability to take photos and videos during the night, yet his failure to capture any images showing the

alleged damage in the same frame as Petitioner, raises serious doubts about his credibility. Dkt. 4 at 54-66. The magistrate's failure to address these contradictions further supports the conclusion that Czodor's testimony was unreliable and false.

The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, *People v. Savvides*, 1 N.Y.2d 554, 557; 136 N.E.2d 853, 854-855; 154 N.Y.S.2d 885, 887:

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

Petitioner suffered prejudice from appellate counsel's failure to raise this issue on appeal that rendered his performance ineffective under *Strickland*. In this case, appellate counsel's failure to challenge Czodor's perjured testimony, deprived Petitioner of a meaningful opportunity to contest the evidence used against her. Given that Czodor's testimony was critical to the prosecution's case, this failure likely affected Czodor's credibility and the outcome of the trial.

The magistrate's finding that "no light bulb is visible" does not negate the clear evidence that the front door was well illuminated. Courts must base their findings on the objective facts presented, not on speculative conclusions. Here, the magistrate's focus on the visibility of a light bulb misses the point: the photos showed sufficient light to disprove Czodor's claim of darkness, making it implausible that he could have missed the damage until the following day. This factual misrepresentation cannot stand under federal due process principles.

The magistrate's misrepresentation of the lighting evidence is a clear error. The introduction of false or misleading testimony violates due process. See *Napue v. Illinois*, 360 U.S. 264, 272 79 S.

Ct. 1173 (1959) (holding that a prosecutor's failure to correct a witness's false testimony that the witness "had received no promise of consideration in return for his testimony" violated the petitioner due process rights and may have impacted the jury's guilty verdict).

The magistrate's finding that Petitioner suffered no prejudice due to the brevity of the prosecutor's remark is erroneous. The focus on word count rather than content misapplies the relevant legal standards for assessing prosecutorial misconduct and its prejudicial effect. The focus is not on the length or number of the prosecutor's words but on whether the statement improperly influenced the jury by misleading or distorting evidence crucial to the defense. A proper analysis would consider the remark's substance and its potential influence on the jury's evaluation of a critical issue in the case - Czodor's credibility.

The prosecutor's comment aimed to explain away Czodor's delayed discovery of the damage by suggesting that darkness obscured his view, despite photographic evidence that Czodor's front door area was well-lit. This directly undercut the defense's position and bolstered Czodor's credibility. As such, the deceptive and misleading remark had improperly influenced the jury, which makes it prejudicial regardless of its brevity.

The magistrate misrepresented the evidence regarding the alleged vandalism of Czodor's door, omitting critical details that significantly undermine the conclusion of "overwhelming evidence." Dkt. 73 at 28.

The photograph of the damaged door was not taken on the night of the alleged vandalism or next day but rather seven days later. This substantial delay in documenting the damage undermines Czodor's credibility and suggests fabrication. The magistrate omitted the fact that Czodor only discovered the damage after learning about the financial cost of removing online comments about his dishonesty. This timeline suggests a motive for fabricating the damage.

In *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), Justice Stone reversed a district court conviction where the defense counsel was precluded from eliciting upon cross-examination a witness' current place of residence. The basis of the trial court's exclusion was that the particular witness was in custody at that time, a fact which might bear unfairly upon his reputation and credibility. The trial judge did not, however, restrict any normal inquiry into whether

the witness had been convicted of a felony. The Supreme Court held that entirely apart from the right of the defense to show past convictions as bearing upon the general credibility of the witness, the defense counsel was entitled to bring out those facts which would bear upon any bias he might have in his testimony in the particular case, because given under a promise or expectation of immunity or under the coercive effect of his detention by officers of the United States. 282 U.S. at 693, 51 S.Ct. 218. Relying upon its supervisory powers, the Supreme Court held that the restriction constituted an abuse of discretion and hence prejudicial error requiring reversal.

In *United States v. Leja*, 568 F.2d 493 (6th Cir. 1977), the court recognized that the jury should be allowed to consider any possible bias of the witness and reversed conviction for failure to allow inquiry into the subject of the compensation, if any, that had been previously paid to the government's witness other than in the immediate case. Here, Czodor's September 24, 2018 email was highly relevant to the question of his potential bias and interest. Trial counsel's failure to bring out those facts which would bear upon any bias constituted ineffective assistance of counsel and prejudiced Petitioner.

Although the prosecution presented a photograph allegedly showing Petitioner "pressing" a metal key to Czodor's door, no damage is visible in the photograph. The magistrate omitted this crucial fact, which directly contradicts the claim that Petitioner caused visible damage during her visit. Additionally, Czodor testified that Petitioner knocked on his door for up to twenty minutes that night, allegedly causing the damage. Given that metal door knockers have been used for centuries, it is highly unlikely that knocking with a metal key would cause substantial scratches.

Notably, Czodor was capable of taking photos and videos throughout the entire night. Had Petitioner truly knocked on his door for twenty minutes and caused damage, it is implausible that Czodor failed to capture any footage showing both Petitioner and the damage together. This absence of video or photographic evidence strongly suggests that the alleged vandalism did not occur, further weakening the prosecution's case.

The magistrate's finding of overwhelming evidence is unsupported by the factual record. A reasonable inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference

drawn from evidence rather than . . . a mere speculation as to probabilities without evidence. *People v. Morris*, 46 Cal.3d 1, 21 (Cal. 1988). Petitioner is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

Inappropriate and inflammatory arguments (subpart of Ground 30) (Dkt. 73 at 28)

The magistrate found the prosecutor drew the jury's attention during closing argument to a video in which she did not deny posting the victim's nude photographs when directly confronted about it. Dkt. 73 at 28. In fact, Czodor stated "About name everything you like. It matters. Wrote some shit about me every night. Who does that? Did you post it? Say the truth. Say the true. You post it?" It's self-evident that Czodor's statement did not refer to nude photos. Dkt. 3 at 115.

A fair trial cannot be had when evidence is "misstated or presented in a false light."

Closing argument presents a legitimate opportunity to "argue all reasonable inferences from evidence in the record." (ABA Standards, The Prosecution Function (1971) std. 5.8(a) (hereafter cited as Prosecution Function).) For a number of years courts repeatedly warned "that statements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct." *People v. Kirkes* (1952) 39 Cal.2d 719, 724 [249 P.2d 1]; see also *People v. Taylor* (1961) 197 Cal.App.2d 372, 381-384 [17 Cal.Rptr. 233].)

In assessing prosecutorial misconduct, the magistrate misrepresented the evidence by overstating Petitioner's response to Czodor's accusation regarding the posting of nude photographs.

The magistrate's interpretation of the conversation between Czodor and Petitioner significantly distorts the actual exchange. A careful review of the actual conversation shows that Czodor's statement was vague and lacked a direct accusation. Czodor said, "About name everything you like. It matters. Wrote some shit about me every night. Who does that? Did you post it? Say the truth. Say the truth. You post it?" Petitioner responded, "I was emotional." This exchange does not directly address the accusation that Petitioner posted nude photographs but rather reflects a generalized conversation about the tensions between the two parties. Dkt. 3 at 115.

The prosecution bears the burden to show that all evidence presented is complete and accurate. The magistrate's conclusion that Petitioner provided no testimony or evidence to support

Petitioner's claims that the video was manipulated or failed to capture her denying Czodor's accusation improperly shifts this burden to Petitioner, requiring Petitioner to prove that the video was incomplete, which contravenes due process principles.

Petitioner has provided substantial evidence to suggest that Czodor is a calculated manipulator and chronic liar, creating grounds to question the integrity of the videos and print-outs of screenshots and photos submitted as evidence in this case. This pattern of deceptive conduct provides a sufficient basis to question the authenticity of these exhibits and raises concerns that the evidence may have been manipulated in several ways, including by altering content, selectively omitting portions, or otherwise misrepresenting events to support a particular narrative.

The magistrate found Petitioner claims that her response to Czodor's accusation was not an admission under California law because she was innocent and thus had no reason to deny it, her claim is not cognizable on federal habeas review because it exclusively concerns California's evidence law. Dkt. 73 at 31. This is legally flawed. A criminal defendant's conviction cannot rest entirely on an uncorroborated extrajudicial confession." *United States v. Stephens*, 482 F.3d 669, 672 (4th Cir. 2007) (citing *Wong Sun v. United States*, 371 U.S. 471, 488-89 (1963)) (emphasis added). An accused's extrajudicial admissions of essential facts or elements of the crime, made subsequent to the crime, are of the same character as confessions, and corroboration by independent evidence is required. *Opper v. United States*, 348 U.S. 84, 89-92 (1954). This means that, regardless of any admission made by Petitioner, the state must still independently establish each fact necessary to meet the crime's elements. Czodor's self-serving testimony and self-produced printouts are insufficient to qualify as independent, credible evidence, especially when substantial evidence suggests he has a history of manipulation and deceit.

A prosecutor's statement constitutes improper argument, if he attempts to smuggle in by inference claims that could not be argued openly and legally. Here, the prosecutor invited the jury to speculate about — and possibly base a verdict upon — "evidence" never presented at trial. In fact, for centuries, door knockers have traditionally been crafted from metal.

The magistrate found a door knocker designed to alert residents of guests without damaging the door is readily distinguishable from repeatedly using a metal key point against an otherwise

unprotected door. Dkt. 73 at 32. If, as alleged, Petitioner spent 20 minutes forcefully scratching Czodor's door with a metal key, such a sound would be distinct from a standard knock due to the loud, repetitive scraping noise produced by metal against wood. Czodor's claim that he heard knocking, but no scratching, calls into question the credibility of his account, especially since a 20-minute scratching session would likely be quite audible.

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Supreme Court established that evidence must be sufficient for a rational factfinder to conclude guilt beyond a reasonable doubt. Here, the absence of corroborating auditory evidence in Czodor's statements — i.e., the scratching sound, which he failed to mention during his 911 call — weakens the claim that Petitioner caused the damage as alleged.

Additionally, Czodor's failure to provide visual evidence linking Petitioner to the damage adds weight to the argument for fabrication. Had Czodor actually documented a photograph or video clearly showing both Petitioner and the damaged door in a single frame, this would have significantly corroborated his version of events. His inability to produce such direct evidence particularly he was able to take photos and videos throughout the night, along with the seven-day delay before capturing a photo of the damaged door, further undermines the credibility of his claim.

Finally, Czodor's misrepresentation about the lighting conditions near his front door raises additional questions. If he was aware of any evidence supporting the assertion that the front door area was well-lit, such a claim could be interpreted as an attempt to obscure the absence of direct evidence of Petitioner's alleged conduct. Taken together, the lack of auditory and visual corroboration, the inconsistent lighting claim, and the delay in documenting the damage support an inference that Czodor may have fabricated the damage to his door, casting substantial doubt on the veracity of his testimony and the strength of the evidence presented against Petitioner. A rational factfinder could not have found petitioner guilty beyond a reasonable doubt of vandalism.

Even if the photo of Czodor's damaged door and the screenshots provided by Czodor, standing alone, could support a finding of guilt beyond a reasonable doubt, such a finding is undermined by other undisputable evidence and by the absence of evidence that would normally be forthcoming. See *People v. Hall*, 62 Cal.2d 104, 111 (Cal. 1964).

Here, the prosecution did not simply ask the jury in closing arguments to make reasonable inferences from the evidence at trial. Instead, the prosecution overstepped the permissible bounds of closing argument by misstating evidence and introducing facts not in evidence, thereby violating Petitioner's right to a fair trial.

Accordingly, appellate counsel was ineffective in failing to challenge prosecution's argument on appeal.

Referring to facts not in evidence (subpart of ground 30) (Dkt. 73 at 32)

The magistrate concluded that because neither party has lodged a copy of the video or screenshots from websites, the Court cannot determine if the video or the websites included the victim's nude photographs. Dkt. 73 at 33.

In habeas corpus proceedings, when the state court record is insufficient to resolve key issues, federal courts have the authority to compel the state to provide additional evidence, including trial exhibits. This principle aligns with federal due process requirements to ensure a complete and accurate review of claims challenging a conviction. Where critical evidence is missing or disputed, district courts may require the state to supplement the record to support a thorough examination of potential constitutional violations.

A habeas petitioner has a right to access necessary materials that would illuminate facts relevant to their claims. Evidentiary gaps in the habeas record warrant further inquiry. The magistrate should have ordered the state to produce trial exhibits because such evidence is essential to resolve specific claims.

Therefore, the magistrate's conclusion is at odds with habeas corpus principles if the failure to obtain the video or website screenshots impedes the court's ability to fairly assess the petitioner's arguments regarding the presence of Czodor's nude photographs.

Despite California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b), in concluding Petitioner and Czodor had a dating relationship the magistrate relied on an unpublished opinion *People v. Hill*, No. B296761, 2020 WL 4364640, at *4 (Cal. Ct. App. July 30, 2020). Dkt. 73 at 35. Such reliance is misplaced. In *Hill*, the two exchanged phone numbers, and the

next morning, they went to IHOP for what Beckwith described as a "breakfast date." A few days later, Hill invited Beckwith to her house and introduced him to her children. The two also spent time together at the barber shop, where Beckwith introduced Hill to his friends. On one occasion, Hill picked Beckwith up at Beckwith's mother's house, and Beckwith introduced Hill to his mother. Hill estimated that, over the course of approximately 10 days to two weeks, the two met three or four times and sent one another text messages. They hugged and kissed, and on one occasion they had sexual intercourse. According to the uncle, Hill described Beckwith as her boyfriend, but said that the relationship was over. None of these facts are present in this case. Petitioner and Czodor never introduced each other to their family or friends. They never had intercourse. They never considered each other boy/girl friend.

The magistrate's conclusion that Petitioner and Czodor had a five-week dating relationship is unsupported by the record. Czodor's own testimony clearly contradicts this interpretation; he explicitly stated that he met Petitioner only once or twice and repeatedly emphasized the lack of any substantial relationship, saying, "Who are you to me? Nobody. You are to me nobody… I met you one or two times. And that's it." This direct testimony undermines any claim that there was a dating relationship as defined by California law. Without concrete evidence of an actual relationship, the magistrate's conclusion fails to align with the statutory requirements.

Under California Family Code § 6210, a "dating relationship" must be "frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations." The evidence does not support such a connection between Petitioner and Czodor. Casual, infrequent encounters, as Czodor described, do not meet the statute's criteria of "frequent, intimate associations," nor is there any suggestion of an expectation of an ongoing relationship. A dating relationship requires more than isolated interactions and must be characterized by mutual intent to form an affectionate or romantic bond.

Additionally, the magistrate's reliance on the Petitioner's comment that Czodor had "cheat[ed]" on her does not establish a dating relationship under § 6210. Feelings of betrayal or disappointment alone do not fulfill the statutory factors necessary to establish a "dating relationship." Such an assertion, without supporting evidence of mutual affection or an intimate

association, is legally insufficient. *People v. Upsher*, 155 Cal.App.4th 1311, 1321-22 (2007), affirms that unsupported implications or misinterpretations of casual comments cannot be the basis for determining the existence of a legally recognized dating relationship.

Therefore, the magistrate's finding lacks evidentiary support, misapplies the standards of § 6210, and disregards clear California precedent, rendering this conclusion both legally and factually flawed.

As such, appellate counsel was ineffective in failing to argue on appeal that the prosecutor referred to facts not in evidence.

Vouching for the victim's credibility (subpart of ground 30) (Dkt. 73 at 36)

Appellate counsel was ineffective by failing to argue on appeal that the prosecutor impermissibly vouched for the victim's credibility.

The prosecutor's comments improperly suggested that Czodor's testimony was credible because of his willingness to "admit" intimate and potentially embarrassing facts in front of the jury. This suggestion of credibility based on personal vulnerability constitutes vouching, as it attempts to enhance Czodor's reliability through emotional appeal rather than evidentiary support. It is improper to make "statements designed to appeal to the passions, fears and vulnerabilities of the jury." *United States v. Weatherspoon*, 410 F.3d 1142, 1149 (9th Cir.2005).

The prosecution's comments here implied that Czodor's testimony was credible merely because he exposed himself to public scrutiny and embarrassment by testifying, a tactic that seeks to leverage the jury's empathy rather than its logical assessment of evidence.

The prosecutor's statements mischaracterized the evidence, suggesting that Czodor was reluctant to testify about his actions or uncomfortable with his nude photos being shared publicly. However, evidence introduced at trial showed that Czodor was comfortable with public nudity, as indicated by his actions of taking nude photos on a beach. This contradicts the prosecutor's insinuation that Czodor's willingness to testify about sending nude photos indicates personal risk and, by extension, credibility.

Here, the prosecution's deliberate mischaracterization of Czodor's motives and experiences was an attempt to sway the jury based on an emotionally appealing but factually inaccurate

narrative. Such comments have led jurors to conclude that Czodor was more credible than the evidence supported, impacting the fairness of the proceedings.

By suggesting Czodor's honest admission the he didn't see than happening when it's happening, the prosecutor added extraneous details to justify Czodor's statements and rebut the defense's counterpoints regarding delaying reporting. Yet, evidence showed that Czodor's front door was well-lit, contradicting the prosecutor's implication that Petitioner's alleged actions could have gone unnoticed.

Prosecutorial statements unsupported by the evidence is improper. Prosecutors comment on a defendant's non-testimonial behavior may impinge on that defendant's fifth amendment right not to testify. See *United States v. Schuler*, 813 F.2d 978, 981-982 (9th Cir. 1987). Prosecutors cannot introduce speculative scenarios or unsupported facts, especially where those narratives are aimed at bolstering a witness's credibility. This tactic misleads jurors, causing them to give undue weight to the witness's testimony rather than evaluating the case solely on admissible evidence.

Expressing opinions to the jury (subpart of ground 30) (Dkt. 73 at 39)

The prosecutor's statement in closing argument—that any online post mentioning Czodor would violate the restraining order—raised significant First Amendment concerns, as it suggested that Petitioner could not even speak about Czodor in a neutral or positive way. This implication reaches beyond the permissible restrictions on speech and into an unconstitutional overreach of the restraining order, infringing upon Petitioner's right to free expression. In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764-65 (1994), the U.S. Supreme Court held that injunctions limiting speech must be narrowly tailored to serve a compelling government interest, preventing speech only as necessary to achieve that purpose. Here, a blanket prohibition against all speech mentioning Czodor would not satisfy this narrow tailoring requirement, which renders the restraining order unconstitutional.

Appellate counsel was ineffective in failing to raise this claim on appeal. The magistrate's reliance on the trial counsel's stipulation regarding the validity of the protective orders overlooks the principle that a stipulation is void if it effectively endorses an unconstitutional order. Given that

trial counsel did not inform Petitioner or obtain her consent, the stipulation is deemed void. The prosecutor's statement is not an established fact. Instead, it's his endorsement of unconstitutional restraining order. The lack of a curative instruction left the jury to rely on an inaccurate understanding of the validity of the restraining order, prejudicing Petitioner's right to a fair trial.

Sufficiency of the evidence (grounds nineteen, twenty, twenty-one, and twenty-two) (Dkt. 73 at 40)

Appellate counsel's decision not to raise sufficiency-of-the-evidence claims was unreasonable. As explained herein, trial counsel had no legal authority to stipulate with the prosecution to waive Petitioner's right to jury trial as to material facts and elements. There is no evidence showing that Petitioner and Czodor, a married man, were in a dating relationship.

The magistrate's finding that no California law supports the proposition that nudists have no expectation of privacy in naked images of themselves they send to another person is misguided and not supported by case law. Dkt. 73 at 43. While the magistrate relied on *Hernandez v. Hillsides, Inc.*, 47 Cal.4th 272 (Cal. 2009), this case is distinguishable from the facts at hand.

The extent of [a privacy] interest is not independent of the circumstances. *Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978). Czodor does not have a blanket privacy interest in his nude photos because of his evident comfort with public nudity, as demonstrated by his conduct at a nude beach. A "reasonable" expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal.4th 1, 37 (Cal. 1994). Under both California and federal law, societal norms play a critical role in determining the reasonableness of privacy expectations.

Public nudity, while legally permissible in certain spaces (such as nude beaches), reflects a lifestyle choice in which the individual voluntarily exposes their body in public. The magistrate acknowledged that Czodor evidently felt comfortable being naked in the confines of a nude beach. Dkt. 73 at 43. By choosing to engage in public nudity, Czodor demonstrates a belief that nudity is acceptable in a public setting, thereby weakening any claim that society would recognize an expectation of privacy in images of his nude body as reasonable. If an individual is comfortable with their body being seen publicly without clothing, the argument follows that society may not

recognize a corresponding expectation of privacy in their nude photos.

People may forfeit privacy expectations when they voluntarily expose themselves in public. Czodor's decision to be nude in a public space undermines the notion that he can reasonably expect the same level of privacy regarding images of his nude body. Nudists believe nudity is acceptable in public spaces. Czodor's engagement in public nudity is a manifestation of his belief that his nude body need not be shielded from public view. As such, it is difficult for the society to find it reasonable for someone like Czodor to expect that images of his nude body, voluntarily sent to another person, would remain private.

In *California v. Greenwood*, 486 U.S. 35 (1988), the Court found that individuals have no reasonable expectation of privacy in trash left out for collection because it was exposed to the public. Similarly, Czodor's public nudity as a practicing nudist suggests that he has forfeited a reasonable expectation of privacy in images of his naked body. Regardless, Petitioner did not have a fair trial because whether a nudist's expectation of privacy in his nude photos is objectively reasonable should have been determined by the jury but it was not.

The magistrate's conclusion that Petitioner necessarily understood Czodor's nude photographs to be private, based solely on the circumstances of their exchange, is speculative and omits essential context that counters any presumption of a reasonable expectation of privacy. Dkt. 73 at 42. This assumption conflicts with established standards regarding privacy and the expectation thereof under both state and federal law, particularly where an individual's conduct suggests a diminished expectation of privacy.

California law on privacy generally provides that an expectation of privacy must be objectively reasonable. In *Hill v. National Collegiate Athletic Association*, 7 Cal.4th 1, 36-37 (1994), the California Supreme Court held that whether a person has a reasonable expectation of privacy depends on (1) whether the individual has exhibited a subjective expectation of privacy, and (2) whether that expectation is one that society is prepared to recognize as reasonable. In this case, Czodor openly admitted to Petitioner that he was a nudist, conveying from the outset his comfort with public nudity. Given this admission, it would be reasonable for Petitioner to infer that Czodor had no expectation of privacy concerning his nude photographs, which were sent after only one

meeting and in a casual context. Czodor's own testimony and conduct undermine any claim of a "subjective expectation" of privacy that would satisfy the *Hill* standard.

Further, federal privacy jurisprudence aligns with this analysis. Courts consistently hold that the context and circumstances surrounding private information, such as its method of communication and the relationship between parties, inform whether an expectation of privacy is reasonable. For instance, in *Smith v. Maryland*, 442 U.S. 735, 736 (1979), the U.S. Supreme Court noted that even if an individual did harbor some subjective expectation of privacy, the expectation was not one that society is prepared to recognize as "reasonable." When an individual voluntarily exposed his nude photos to someone he barely knew (Czodor testified he didn't know Petitioner's name. See Dkt. 6 at 155), he assumed the risk that the stranger would reveal those photos. By communicating nude photographs to a person he had met only once, Czodor diminished any reasonable expectation of privacy in those images, especially given his stated identity as a nudist.

Additionally, the magistrate's reliance on the presumption that nude photographs are inherently private overlooks Czodor's own actions. Sending nude photos taken in a public setting further contradicts any alleged privacy interest, as a reasonable person could interpret such behavior as an indication of comfort with those images being viewed by others. The *Smith* decision and similar rulings underscore that an individual's actions can vitiate any claim to privacy, especially where, as here, they communicate potentially private information to another in a casual and brief context without restrictions or indications of confidentiality.

In sum, the magistrate's presumption is legally flawed, as Czodor's actions and the specific context in which he disclosed the images undermine any reasonable expectation of privacy. This context strongly suggests that Petitioner could reasonably interpret the photographs as non-private, challenging the magistrate's conclusion and requiring reevaluation under established privacy standards.

The magistrate's conclusion that the jury could infer Petitioner's knowledge of Czodor's expectation of privacy in his nude photographs is legally flawed. This determination disregards the requirement for an objectively reasonable expectation of privacy under both California and federal law. The magistrate's reasoning relies on Petitioner's alleged threats to "make him famous" and

"put all [his] stuff on social media," yet fails to provide evidence that Petitioner's statements referenced nude photographs specifically, rather than Czodor's character or other conduct.

Here, Czodor, as a self-admitted nudist, conveyed his openness regarding nudity by sending these photographs to Petitioner, a person he had only recently met just once. Czodor's lack of precautions and his nudist lifestyle would reasonably suggest a diminished expectation of privacy, undermining the presumption that his photos were inherently private.

Federal privacy law also supports this analysis. By voluntarily sending nude images without imposing confidentiality, Czodor reduced any legitimate privacy claim, particularly with respect to someone he had just met.

Moreover, California case law holds that privacy expectations must be balanced against the circumstances and nature of the interaction. In *People v. Nakai*, 183 Cal.App.4th 499, 515-517 (2010), the court emphasized that the individual's behavior and context affect the reasonableness of their privacy expectation. Czodor's decision to send nude images after only one meeting and his admitted nudist lifestyle indicate a lack of concern with restricting access to such images, which would lead a reasonable observer to question any assumption of inherent privacy.

Petitioner's messages, even if potentially threatening, lack specificity regarding nude photographs. The assumption that she understood these photos as "private" is speculative, as her statements could have been aimed at exposing his dishonesty or other character issues, rather than the images themselves. Because the prosecution did not substantiate Czodor's privacy interest through objective, concrete evidence and failed to connect Petitioner's alleged threats specifically to the photos, the magistrate's conclusion is legally unsound.

In sum, without a basis for an objectively reasonable expectation of privacy in Czodor's images under California and federal standards, and without clear reference to these images in Petitioner's messages, the magistrate's inference is unsupported. Courts must require evidence that society would view the expectation as reasonable, which is lacking in this case.

The magistrate found the jury was aware that one of the nude photographs that Czodor sent to Petitioner was taken at a nude beach and the jury's verdict evidenced its belief that Petitioner and Czodor agreed or understood that the images shall remain private even though one of the

photographs was taken at a nude beach and sent by the victim after knowing Petitioner for only a few weeks. However, the jury was never told the photo taken on a nude beach was evidence showing Czodor's comfort level of public nudity.

During closing argument, the prosecution stated "But ask yourself, reasonably, why in the word is she knocking on the door with keys – with metal keys? Why in the world would you be knocking on the door with metal keys?" The insinuation was that defendant had been tried on previous criminal charges, although no proof of such arguments was offered. *People v. Fosselman*, 33 Cal.3d 572, 580 (Cal. 1983). See also *Langston v. Smith*, 630 F.3d 310, 320 (2d Cir. 2011) (due process violated because no evidence presented by prosecution to support theory besides "pure conjecture.") The prosecution's implication that no one would knock on a door with metal object was not supported by any evidence presented at trial. In reality, metal objects are commonly used for knocking on doors, as door knockers themselves are typically made of metal.

Right to confrontation (ground 25) Dkt. 73 at 45

In order to secure a conviction under California Penal Code § 647(j)(4)(A), the prosecution must prove that the defendant distributed the image. Dkt. 3 at 160.

Despite there was no sufficient guarantees of trustworthiness, through Czodor's testimony, the prosecution introduced text messages from Czodor's so called friend and statements made by Czodor's clients. Assuming they were authentic statements, they were given with the primary purpose of offering evidence potentially relevant to a subsequent criminal prosecution. They were used to establish an essential element of the prosecution's case, meaning they had a testimonial nature.

The relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred. *Michigan v. Bryant*, 562 U.S. 344, 360, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011).

A violation of the Confrontation Clause raises a federal constitutional issue, not just a matter of state evidence law. The magistrate's finding that Petitioner's confrontation claim is not reviewable because it concerns state evidence law is legally flawed.

Substitution of counsel (ground 29) (Dkt. 73 at 47)

Here, the trial court deprived Petitioner of her Sixth Amendment right to conflict-free counsel by denying her motion for substitution. Petitioner explicitly declared that she had a conflict with the office of public defender instead of only Mr. Dominguez. Dkt. 3 at 217.

Adequacy of the Court's Inquiry: In *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir. 1998), the Ninth Circuit stressed that the trial judge must actively engage with the defendant's complaints and ensure that the issues raised are fully addressed. In Petitioner's case, while the trial court asked trial counsel some basic questions about procedural matters like a general time waiver, it failed to explore critical aspects of the representation, such as what investigation had been conducted in the two years the public defender had the case and what justified the repeated time waivers. This failure indicates that the court's inquiry was inadequate and resulted in no developed record on counsel's reasons for their actions, or on the quality of communication between them and Petitioner. See *United States v. Walker*, 915 F.2d 480, 483 (9th Cir. 1990) (holding that the district court erred in making only a limited inquiry and failing to inquire into causes underlying defendant's dissatisfaction with his attorney). The inadequacy of inquiry was underscored by trial counsel explicit testimony that none of the continuances were attributable to his caseload. (See Dkt. 3 at 207 ("As to congestion of the courts in my caseload, no, Your Honor. I just requested time to prepare and review the filed in preparation for trial.") If none of the continuances were attributable to caseload, what exactly caused the two years delay?

Extent of Conflict: Petitioner alleged a significant breakdown, citing the rotation of six different public defenders over the two years leading to a failure to progress the case to trial in a timely manner, coupled with the lack of investigation and failure to inform Petitioner of court date which caused a bench warrant issued against Petitioner. Further, counsel's later decision to sign a stipulation with the prosecution without consulting Petitioner reflects this pre-existing conflict, signaling a lack of communication and trust between Petitioner and her counsel.

Timeliness and Inconvenience: Petitioner made her request for substitution as soon as she reasonably could, after realizing the extent of inadequacy of counsel's performance. Although the public defender had been on the case for two years, the fault for any delay does not rest with

Petitioner, particularly given the turnover of attorneys on her case. Even when the motion is made on the day of trial, the trial court must make a balancing determination, carefully weighing the resulting inconvenience and delay against the defendant's important constitutional right to counsel of his choice. *United States v. Lillie*, 989 F.2d 1054, 1055-56 (9th Cir. 1993); *United States v. Torres-Rodriguez*, 930 F.2d 1375, 1380 (9th Cir. 1991).

Delaying a trial is often a lesser evil compared to the damage that could be done by proceeding with counsel who cannot effectively represent the defendant due to a breakdown in communication or other serious issues. The defendant's right to a fair trial and competent representation must be prioritized.

The magistrate's characterization of Petitioner's concerns as "strategical" issues ignores whether counsel's performance was objectively reasonable. Dkt. 73 at 49. Petitioner's concerns go beyond simple strategy. As the record shows, there was a significant delay of over two years, six different public defenders cycled through the case, and failure to inform Petitioner of court date. These are not mere tactical disagreements but legitimate concerns about the adequacy of representation and neglect of the case. Counsel's failure to communicate and the significant delays raise issues of ineffective assistance, rather than disagreements over tactics.

In supporting her conclusion that there was no conflict of interest between Petitioner and her counsel, the magistrate found counsel testified that he explained to Petitioner what a time waiver was so Petitioner knowingly and voluntarily agreed to waive time. Dkt. 73 at 50. However, the trial continuances, attorney rotations, and absence of any benefit from the repeated time waivers suggest that Petitioner's right to effective assistance of counsel was compromised. While counsel testified about explaining a time waiver to Petitioner, he did not testify how he explained a time waiver. There is no record in support that Petitioner made a knowing and intelligent choice of time waiver. The broader context of attorney performance and trial delays need to be assessed. The fact that the records offer no legitimate reason for a two-year delay, compounded by the rotation of six public defenders, raises serious concerns about the adequacy of representation.

The magistrate further justified her conclusion by citing Covid-19. Dkt. 73 at 50. The two-year delay—justified only by a two-month court shutdown due to COVID-19—is excessive.

Without any documented benefit from the continuances, the delay prejudiced Petitioner. The magistrate's reliance on a two-month COVID-19 court disruption to justify a two-year delay is factually incorrect and not supported by the records.

The magistrate faulted Petitioner for her failure to provide any evidence to substantiate her assertion that appointed counsel caused an arrest warrant to be issued against her. Dkt. 73 at 51. However, the record shows otherwise. Bench warrant was issued for defendant. Bail was set at $15,000.00. Dkt. 3 at 21-22.

The magistrate concluded that even if Petitioner could establish a conflict of interest – she cannot – she nevertheless could show no prejudice. Dkt. 73 at 51. The magistrate found trial counsel filed a motion to dismiss for lack of evidence pursuant to California Penal Code 1118.1 at the close of evidence. Dkt. 73 at 52. However, record shows that trial counsel orally requested the Court to dismiss the case based on the People have not met their burden, based on 1118. Dkt. 4 at 124. He provided no explanation how the evidence was insufficient as to what specific element. Then the trial court made a conclusory statement that "as far as the 1118.1 motion is concerned, I think with respect to Count I, the evidence provided is sufficient to get past an 1118.1 motion based on the testimony and the exhibits that were received into evidence, similarly with Count II, the evidence presented is sufficient to overcome an 1118.1 motion, and similarly as to Count III. So with respect to all three counts, Defense counsel's 1118.1 motion is denied." Dkt. 4 at 131. The record does not show trial counsel played the role of an active advocate. See *Evitts v. Lucey*, 469 U.S. 387, 394, 105 S.Ct. 830, 835, 83 L.Ed.2d 821 (1985).

However, the trial court's denial of Petitioner's request for substitution of counsel must be evaluated based on whether counsel's performance was compromised, not merely on the success of individual motions.

Trial counsel (Ground 9) (Dkt. 73 at 53)

As stated above, ineffective assistance of counsel claims are not subject to the strictest procedural forfeiture rules. See *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011).

The magistrate found Petitioner waived her right against self-incrimination at the family-court hearing because she never asserted it and no evidence suggested that her family-court

testimony was compelled. Dkt. 73 at 55. However, if the State, either expressly or by implication, creates penalty situation, the failure to assert the privilege would be excused, and the answers would be deemed compelled and inadmissible in a criminal prosecution. See *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984).

In the context of Petitioner's appearance in family court, the coercive nature of the proceeding creates what is known as a "penalty situation," which implicates the protections of the Fifth Amendment under the U.S. Constitution.

Petitioner was summoned to the family court to answer questions. See Attachment 2. Petitioner was a party to a court hearing and was subject to a court order to appear. The prosecution erroneously alleged that Petitioner was not even subpoenaed to attend the hearing. Dkt. 3 at 278. However, the use of a subpoena is generally required only for third-party witnesses, not for parties to the case. A notice of hearing issued to a party functions as a court order and compels the party's appearance. The prosecution's claim that Petitioner was not "subpoenaed" to attend the hearing ignores the distinction between subpoenas for third parties and court orders directed to parties involved in the case. Since Petitioner was a direct party in the matter, her presence was mandated by the court's notice of hearing, making the prosecution's argument factually and legally incorrect.

At the family court hearing, Petitioner was faced with a choice between remaining silent and having an adverse judgment against her. Her silence was deemed as a waiver of argument in support of an adverse judgment. Under the U.S. Supreme Court's rulings in *Lefkowitz v. Cunningham*, *Garrity v. New Jersey*, and *New Jersey v. Portash*, Petitioner's testimony in family court was compelled through the implied threat of an adverse judgment and her failure to assert the privilege would be excused.

In *Solano-Godines*, the court rejected the argument that absence of warnings required suppression because "[t]he immigration judge could not be expected to anticipate that two years later [the defendant] would illegally reenter the United States and that his responses to questions at his civil deportation hearing might incriminate him in a prosecution for this future crime." *United States v. Solano-Godines*, 120 F.3d 957, 962 (9th Cir. 1997).

Unlike *Solano-Godines*, the judicial officer in the family court was fully aware of the

foreseeable criminal prosecution against Petitioner because she was addressing matters intertwined with criminal liability. See *Jackson v. Conway*, 763 F.3d 115, 139-40 (2d Cir. 2014) (*Miranda* violation because child protection services caseworker failed to give warning before questioning that was reasonably likely to elicit incriminating response.) The family court hearing was in fact equivalent to a criminal trial if Petitioner's testimony in that hearing was introduced in a criminal trial. Petitioner's testimony in the family court was compelled and thus should be inadmissible in her criminal case under the Fifth Amendment.

Referring to Petitioner's family-court testimony during closing argument (Dkt. 73 at 56)

In *Berger v. United States*, 295 U.S. 78, 88 (1935), the Court emphasized that improper suggestions, insinuations and, especially, assertions of personal knowledge by prosecuting attorney are apt to carry much weight against the accused when they should properly carry none. The prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence. *Id*. at 88-89. A prosecutor's "vigorous" presentation of facts favorable to his or her side "does not excuse either deliberate or mistaken misstatements of fact." *People v. Purvis* (1963) 60 Cal.2d 323, 343 [33 Cal.Rptr. 104, 384 P.2d 424].

The transcript of the family-court testimony reflects that Petitioner explained that she did not need his permission to post a video because "that's about me, about my story." When being asked if there was a picture of Czodor on the video, Petitioner testified no. (Dkt. 6 at 169.) Relying on Petitioner's admission of posting a video, the prosecutor concealed Petitioner's denial of a picture on the video and stated:

> [Petitioner] said she didn't need his permission. It was her story. Did you post the videos? "Well, maybe some of them." Under oath, spoke to the judge in that hearing and admitted that. The evidence is abundantly and absolutely clear she's guilty of Count III."
>
> (Dkt. 4 at 175-76.)

While there was no picture on the video, Petitioner's admission of posting a video cannot be

used as evidence to convict her of unlawful dissemination of private photographs. By concealing the fact that there was no picture on the video such misrepresentation was egregious. By misrepresenting the content of Petitioner's testimony and using an incomplete and distorted version to suggest her guilt for Count III (unlawful dissemination of private photographs), the prosecutor violated Petitioner's due process rights under the Fifth and Fourteenth Amendments.

The prosecutor's manipulation of Petitioner's family court testimony by concealing the crucial fact that no photograph of Czodor appeared in the video constitutes prosecutorial misconduct. Such a misrepresentation is egregious, misled the jury, and violated Petitioner's constitutional rights to due process under the Fifth and Fourteenth Amendments. The misrepresentation deprived Petitioner of a fair trial.

The prosecution's selective use of Petitioner's response, "It's been taken down," to suggest she authored the posts, while omitting her further explanation that she searched for the posts after receiving the restraining order and found they were no longer there, constitutes prosecutorial misconduct. Dkt. 6 at 168. This tactic misrepresented the evidence and misled the jury by providing an incomplete and distorted view of Petitioner's statements. Such conduct violates Petitioner's constitutional rights under both California and federal law.

Misrepresenting facts to the jury, especially through selective omission of exculpatory information, constitutes prosecutorial misconduct. Here, by omitting Petitioner's complete explanation of why she stated "It's been taken down," the prosecution gave the false impression that Petitioner admitted authorship of the posts. This manipulation of evidence is precisely the type of misconduct the Supreme Court sought to prevent in Berger.

In *Napue v. Illinois*, 360 U.S. 264, 269 (1959), the Court held that due process is violated when a prosecutor knowingly uses false evidence or allows false impressions to stand uncorrected. In this case, by omitting the full context of Petitioner's statement, the prosecutor effectively created a false impression that her response indicated guilt. The jury was left with an incomplete picture, leading to a violation of Petitioner's due process rights.

Here, the prosecutor's omission of Petitioner's full response was highly material and prejudicial because the suggestion that she authored the posts went directly to the heart of the case.

By concealing the explanation that she simply discovered the posts were gone after searching, the prosecutor distorted the evidence, influencing the jury's view of her culpability.

California law similarly recognizes prosecutorial misconduct when the prosecution distorts evidence or misleads the jury. In *People v. Hill*, 17 Cal. 4th 800, 845 (1998), the California Supreme Court held that prosecutorial misrepresentation or omission of crucial facts can lead to reversible error if it prejudices the defendant's case. The prosecutor's failure to provide the full context of Petitioner's statement amounts to such a misrepresentation, as it directly affected the jury's understanding of her involvement in the posts.

Even each prosecutorial misconduct or other error is harmless standing alone, the combined prejudicial effect on the overall fairness of the trial cannot be ignored. As such the magistrate's finding trial counsel did not perform unreasonably in failing to object to either of the prosecutor's comments is flawed. Dkt. 73 at 57.

Fundamental Miscarriage of Justice (Dkt. 73 at 58)

The magistrate's conclusion made no mention of the evidence that destroyed Czodor's credibility, and it did not consider the relative strength of all evidence.

"Fundamental miscarriage of justice" is narrowly defined as consisting of four categories: (1) [T]hat error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; [fn.] (2) that the petitioner is actually innocent of the crime or crimes of which the petitioner was convicted; [fn.] (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed a sentence of death; [fn.] (4) that the petitioner was convicted or sentenced under an invalid statute. (*In re Clark* (1993) 5 Cal.4th 750, 797-798.)

Claims of "lack of fundamental jurisdiction" (i.e., subject matter jurisdiction) or judicial acts "in excess of jurisdiction" may be raised at any time, and the petitioner is not required to justify any delay in asserting the claim. (*In re Harris* (1993) 5 Cal.4th 813, 836-842.)

GROUNDS ONE AND THREE: FIRST AMENDMENT CHALLENGES (Dkt. 73 at 59)

In concluding that Petitioner's conviction for unlawfully disseminating the victim's nude

photographs did not violate the First Amendment, the magistrate referenced the texts provided by Czodor – with no metadata – stating that Petitioner wanted to make him "suffer" for "cheat[ing]" on her and told him that she was going to make him "famous" by "put[ting]' all [his] stuff on social media." (Dkt. 73 at 63) She further threatened to post additional "surprise[s]" and told him, "I will not stop." However, the police filed activity report on September 10, 2018 tells a notably different story. After allegedly being threatened by Petitioner to post additional surprises, Czodor called the police, not to report the threatening texts sent by Petitioner, but to allege that unknown subjects had threatened to come to his residence, not mentioning any reference to the threatening text messages he later presented as evidence. This inconsistency suggests that the threatening texts were most likely fabricated or manufactured by Czodor. The absence of metadata for the text messages further weakens their credibility. Metadata, which includes details like timestamps and source information, is essential to verify the origin, authenticity, and timing of digital communications.

In addition, Petitioner was not prosecuted for intending her speech as a threat. It is equally significant that while Czodor was able to provide texts containing alleged threats, he failed to present any messages indicating that Petitioner requested his nude photos, that he asked her to keep them private, or that she agreed to maintain their confidentiality before receiving Czodor's nude photos. The absence of these crucial communications strongly indicates that such exchanges never occurred.

The magistrate failed to consider the unique circumstances in this case. Czodor, as a practicing nudist, complicates the prosecution's argument that he had an objective expectation of privacy in his nude photos. Courts have ruled that the context in which a person shares private images matters. For instance, if someone knowingly sends intimate photos to a person they barely know, it weakens the argument that they held a reasonable expectation of privacy in those images. See *State v. Vanburen*, 214 A.3d 791, 2018 Vt. 95 (Vt. 2019).

In *United States v. Jacobsen*, 466 U.S. 109 (1984), the Supreme Court clarified that the expectation of privacy is contextual and depends on whether the person's actions demonstrate they intended to keep the material private. Czodor's sending of nude photos to Petitioner, whom he barely knew, after a single meeting, significantly undermines his claim of a reasonable expectation

of privacy.

Furthermore, Czodor's nudist lifestyle plays a central role in this analysis. By engaging in a lifestyle where nudity is normalized and openly displayed, Czodor arguably waived any reasonable expectation of privacy in images of himself in that state. The magistrate's failure to consider this fact is critical, as the public nature of his nudity as a nudist contradicts the claim that he held a strong expectation of privacy in his nude photos.

The magistrate's ruling implies that Czodor can selectively assert privacy in his nude images while maintaining a lifestyle of public nudity. However, courts have held that privacy claims must be consistent with a person's overall behavior and lifestyle. In *Smith v. Maryland*, 442 U.S. 735 (1979), the Supreme Court held that an individual's behavior can diminish their claim to privacy protections if their actions suggest they have exposed themselves to public view.

As a nudist, Czodor's consistent practice of publicly displaying his nude body suggests that his subjective expectation of privacy in nude images shared with Petitioner is diminished. Moreover, there is no authority cited by the magistrate to support the proposition that a nudist can selectively claim privacy rights in certain circumstances, despite their broader lifestyle of public nudity.

Czodor testified that his nude photo was taken at a nudist beach – a public space. He also testified that taking a nude photo by someone else at a public beach was normal.

Q Okay. And do you recall when that photo of
yourself was taken, or where it is?
A Oh, it was on the -- on the naturalist beach.
Q On the naturalist beach.
A Naturalist beach.
See Dkt. 4 at 45.
Q Okay. And can you describe, I think it was
Exhibit Number 1, can you -- can you describe one of the
pictures that -- the nude photos?
A Just normal beach -- beach photo -- the photo

on the beach.

Q Okay. Did you take that photo?

A No, I couldn't do it, but somebody else was there --

Q Okay.

A -- to do it, another person.

Q So another person took that photo.

A Yes.

Q And you were posing, correct?

A I wasn't --

Q In that photo.

A -- posing, just normal.

See Dkt. 4 at 101-102.

Czodor, being a practicing nudist, had no reasonable expectation of privacy in his nude photographs. For a nudist, not wearing clothes is a normal and intentional act, part of the lifestyle associated with nudism. Since Czodor voluntarily posed for a nude photograph in public while adhering to a lifestyle that openly embraces public nudity, his expectation of privacy regarding these photos is not one that society would recognize as reasonable.

See *Katz v. United States*, 389 U.S. 347, 351 (1967) (holding that there is no reasonable expectation of privacy in what a person "knowingly exposes to the public"). In Czodor's case, the public nature of nudist beaches, combined with his status as a nudist, challenges the legitimacy of any objective expectation of privacy in his nude photos.

The magistrate mischaracterized Ground One as a disguised sufficiency-of-the-evidence claim. Dkt. 73 at 63. However, Ground One relies on facts that were not made available to the jury during trial, coupled with facts presented to the jury. Specifically, the fact that Czodor is a nudist was not presented to the jury, and this information is critical to the claim. Habeas claims based on facts not presented at trial are distinct from sufficiency-of-the-evidence claims.

The magistrate found Ground One is procedurally barred. Dkt. 73 at 63. This is contradicted

to her conclusion that only grounds two, eight, nine, nineteen, twenty, twenty-one, twenty-two, twenty-five, twenty-nine, and thirty are procedurally defaulted. Dkt. 73 at 19.

The magistrate vaguely concluded ample evidence showed that both Czodor and Petitioner understood that the nude photographs he sent her were meant to remain private but failed to specify any evidence. Dkt. 73 at 63. To the contrary, ample evidence supports that Czodor lacked a reasonable expectation of privacy in the nude photographs he sent to Petitioner, and they were not intended to remain private.

As a practicing nudist, he regularly engages in behavior where being unclothed is normalized, making any claim of privacy in his nude photographs inconsistent with his lifestyle choices. Furthermore, he sent the nude photographs to Petitioner after meeting her only once, while not even knowing her name, and outside the context of any established relationship or dating connection. This conduct significantly undermines any legitimate expectation of privacy in his images.

Moreover, Czodor was a married man of over ten years, and his testimony that he never sent nude photographs to anyone else except Petitioner is highly suspect, if not perjurious. Dkt. 4 at 105. His inconsistent testimony, alongside this implausible assertion, casts doubt on his credibility, suggesting he is manipulating the facts to serve his narrative. In light of his actions and the lack of a reasonable or objective expectation of privacy, any dissemination of the photos by Petitioner would not constitute a violation of privacy under the relevant legal standards.

Thus, based on the totality of circumstances, Czodor's claims of privacy in the nude photographs are not only unreasonable but also unsupported by the facts, as shown by his inconsistent testimony and lifestyle as a nudist.

Czodor’s inconsistent allegations and perjured testimony reveal a clear and desperate attempt to convict Petitioner, undermining the credibility of his statements and raising serious concerns about the fairness of the trial. Multiple instances of conflicting testimony, including Czodor’s claims about the nature of his relationship with Petitioner, his privacy expectations regarding the nude photographs, and his interactions with law enforcement, suggest that he altered his narrative to fit the prosecution’s case.

For example, Czodor claimed that he only sent his nude photographs to Petitioner, despite being a married man for ten years and a practicing nudist, which contradicts both his lifestyle and common behavior associated with nudism and marriage. Despite he failed to provide any texts, Czodor's claim that he reached an agreement with Petitioner to keep his images private further demonstrate an effort to manipulate the facts.

Czodor's shifting testimony, which lacks internal consistency and contradicts the evidence presented, indicates a calculated effort to fabricate facts in pursuit of a conviction against Petitioner. Such conduct taints the integrity of the legal process, demanding close scrutiny and a reevaluation of the evidence supporting his claims.

Where the individual depicted did not have a reasonable expectation of privacy—a prosecution of dissemination of photographs would not be a justifiable incursion upon First Amendment protected speech. *State v. Vanburen*, 214 A.3d 791, 813, 820-21 (Vt. 2019). As such, Petitioner is entitled to habeas relief.

Petitioner' Conviction for Violating a Protective Order (Dkt. 73 at 63)

The stipulation by trial counsel regarding the validity of the family court orders lacks binding effect on Petitioner, as it was neither informed nor authorized by Petitioner, and moreover, pertains to unconstitutional orders.

Under both federal and California law, individuals cannot be bound by stipulations that relinquish constitutional rights without informed consent. Courts have held that counsel's power to stipulate is limited, especially in criminal cases where fundamental rights are at stake. In *Boykin v. Alabama*, 395 U.S. 238 (1969), the U.S. Supreme Court emphasized that certain rights—such as the right to a jury trial, the right to confront one's accusers, and the right against self-incrimination—cannot be waived without clear, informed consent by the defendant.

In this case, trial counsel's stipulation to the validity of family court orders on Petitioner's behalf, without obtaining her explicit, informed consent, effectively relinquishes her constitutional right to challenge invalid restraining orders.

If the family court orders are unconstitutional on their face, any stipulation of validity would be void. In *United States v. Mendoza-Lopez*, 481 U.S. 828, 839-840 (1987), the Supreme Court held

that defendants have the right to challenge the constitutionality of prior orders used against them in criminal proceedings.

Since Petitioner did not consent to stipulate the validity of these family court orders, and considering that these orders may infringe upon her First Amendment rights by broadly restricting all speech rather than narrowly tailored unprotected speech, any stipulation by counsel that they are valid is void as against public policy. Orders that are unconstitutional cannot be validated by stipulation, as doing so would contravene the due process rights of the individual involved.

The failure of trial counsel to inform Petitioner of the stipulation and its consequences constitutes ineffective assistance of counsel. Under *Strickland v. Washington*, 466 U.S. 668 (1984), ineffective assistance is established where counsel's performance falls below an objective standard of reasonableness and prejudices the defendant. Petitioner's lack of knowledge and consent regarding the stipulation left her unable to make an informed choice, violating her Sixth Amendment rights.

In addition, Petitioner's presence when the stipulation was read and the absence of her objection do not equate to consent, especially when trial counsel failed to explain its implications.

In summary, trial counsel's stipulation to the validity of the family court orders was made without Petitioner's informed consent, pertained to orders unconstitutional on their face, and therefore is void under both California and federal law.

In concluding that Petitioner implicitly approved of trial counsel's stipulation because she was present and raised no objection when counsel first proposed it and later when he entered into it, the magistrate's reliance on *United States v. Edwards*, 897 F.2d 445, 446-47 (9th Cir. 1990) is misplaced, in which it held that the court has no duty to advise the defendant of his right to testify, nor is the court required to ensure that an on-the-record waiver has occurred.

The right to a jury trial is a structural constitutional guarantee, a fundamental right, essential for preventing miscarriages of justice, distinct from a defendant's individual right to testify. In *Edwards*, the court reasoned that because the right to testify is a personal right, it may be waived implicitly by conduct. However, the right to a jury trial implicates different constitutional concerns and typically requires an explicit, knowing, and voluntary waiver on the record (see *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968)). Consequently, while a defendant's silence may be

sufficient to waive the right to testify, it is not sufficient to waive the right to a jury trial or an essential element related to the trial process, like a stipulation on material facts or elements.

The magistrate's inference that Petitioner's lack of objection constituted approval is incorrect, as her lack of objection was a direct consequence of ineffective assistance of counsel. Effective assistance of counsel requires that attorneys communicate key strategic decisions to their clients, including the potential consequences of stipulations, in a way that enables the client to make informed choices regarding their defense.

Here, trial counsel's failure to inform Petitioner about the stipulation with the prosecution, including its strategic purpose and possible consequences, constitutes deficient performance. Without this critical information, Petitioner could not have knowingly consented or objected, stripping her of the ability to make an informed decision—a fundamental right in criminal proceedings. Petitioner's confusion throughout the proceedings underscores that her counsel did not provide her with the necessary context or information about the stipulation. Petitioner's lack of objection was not a conscious waiver but rather a symptom of ineffective assistance of counsel.

Petitioner cannot be bound by this stipulation, as it infringes upon her due process and First Amendment rights.

In concluding that Petitioner's conviction for violating a protective order did not infringe upon her First Amendment rights, the magistrate overlooked a fundamental question: whether the protective orders themselves were constitutional. This oversight is significant because a conviction for violating an unconstitutional order cannot stand, as individuals cannot be penalized for failing to comply with an unlawful restriction on their rights. Here, the restraining orders prohibited not only unprotected speech, such as "true threats," but all forms of speech directed at or concerning Czodor. This overbreadth renders the orders unconstitutional and thereby void, undermining the validity of Petitioner's conviction.

Under both federal and California law, the First Amendment protects freedom of speech, including the right to criticize, comment on, or even address others, with limited exceptions for categories of unprotected speech, such as "true threats" or "fighting words" (*Virginia v. Black*, 538 U.S. 343, 359 (2003); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). For a restraining

order to comply with the First Amendment, it must be narrowly tailored to prohibit only those forms of speech that would qualify as unprotected; blanket restrictions on all speech are impermissibly broad and restrict more speech than necessary.

The restraining orders in this case do not appear to meet these criteria. By prohibiting all speech from Petitioner concerning Czodor, regardless of the nature or context of the speech, they limit not only potentially threatening or harassing communications but also speech that could be protected under the First Amendment. Courts have repeatedly invalidated similar overbroad restrictions, finding that overly inclusive orders infringe upon constitutional rights. For example, in *Madsen v. Women's Health Center*, 512 U.S. 753, 765 (1994), the U.S. Supreme Court emphasized that injunctions restricting speech must be "narrowly tailored to burden no more speech than necessary."

Federal precedent requires that any restriction on speech, including protective orders, be narrowly tailored to specific concerns about unprotected speech. If the restraining orders here were unconstitutional in their overbreadth, then Petitioner's conviction for violating them is legally unsound. A person cannot be convicted for disobeying an order that itself violates constitutional protections. As stated in *People v. Gonzalez*, 12 Cal.4th 804, 824-825 (1996), the interest of the individual in avoiding the coercive effect of void injunctive orders is more substantial than the interest of society in vindicating a court's power by maintaining deference even to void orders.

First Amendment rights are foundational and not easily overridden by court orders. Enforcing an order that voids constitutional rights does more harm to justice than good by upholding judicial power at the expense of individuals' freedoms. See Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Walker v. City of Birmingham, 388 U.S. 307 (1967); Thornhill v. Alabama, 310 U.S. 88 (1940); and Near v. Minnesota, 283 U.S. 697 (1931).

Further, the California Supreme Court established in In re Berry (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273], a case involving a misdemeanor contempt prosecution, that "the violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt [citations], and that the 'jurisdiction' in question extends beyond mere subject

matter or personal jurisdiction ...." Rather, " 'any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction.' " (Ibid.) Specifically, the court held in Berry that a defendant should not be tried in the municipal court for misdemeanor contempt for violating a temporary restraining order issued by the superior court during a labor dispute, when the superior court's order was violative of defendant's First Amendment rights.

Here, since the restraining orders restrict all forms of speech—protected and unprotected alike—without a clear and specific basis, they fail the requirement of narrow tailoring necessary to limit speech-related restrictions. Therefore, they were violative of Petitioner's First Amendment rights and Petitioner should not have been prosecuted in the first place.

The magistrate's focus on what speech constituted unprotected speech misses a crucial analysis: whether the restraining orders themselves met constitutional standards. Given that these orders effectively prohibited all speech, they not only exceed permissible bounds but also lack any narrowly tailored purpose required for speech-related orders. This omission in the magistrate's review fails to account for the threshold requirement that any restriction on speech must first be constitutional. Convictions based on unconstitutional orders cannot be sustained, as established in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969), where the Supreme Court held that a law subjecting the right of free expression, without narrow, objective, and definite standards is unconstitutional, and a person faced with such a law may ignore it and exercise his First Amendment rights.

The magistrate erred by not addressing the constitutional validity of the restraining orders themselves according to First Amendment. Given that these orders are overly broad and restrict more speech than permissible, they are unconstitutional and cannot support Petitioner's conviction. Thus, Petitioner's conviction should be vacated, as it rests on orders that violate the First Amendment.

GROUNDS FOUR, FIVE, AND SIX: BRADY VIOLATIONS (Dkt. 73 at 65)

September 10, 2018 Police Field Activity Report (Dkt. 6 at 200)

The Police Field Activity Report dated September 10, 2018, explicitly states that "CP HAS BEEN REC'VG CALL FROM **UNK SUBJS** THREATNING TO COME TO HIS RESD AT 2521 N JACARANDA AND 242 HIM." This report clearly indicates that the complainant, identified as Czodor, reported receiving threatening calls from "**unknown subjects**." Notably, nowhere in this report is Petitioner identified, nor is there any mention of text messages or other forms of direct communication from Petitioner.

Despite this clear language, the magistrate incorrectly interpreted the report, concluding that on September 10, 2018 Czodor reported that Petitioner had threatened to come to his home and commit battery. This interpretation is refuted by the evidence presented in the police field activity report. If Petitioner had indeed made such threats, it stands to reason that Czodor, being the complainant, would have identified Petitioner by name rather than referring to the caller as an "**unknown subject**." The failure to identify Petitioner at the time of the report strongly suggests that Czodor did not perceive Petitioner as the source of the threats.

Furthermore, had Petitioner sent threatening messages to Czodor, it is reasonable to expect that Czodor would have presented this evidence to the police during the initial report on September 10, 2018. The absence of any mention of such messages in the report, combined with Czodor's identification of the caller as unknown, casts significant doubt on the veracity of Czodor's later claims. The fact that these allegations and text messages surfaced only at a later date further supports the argument that they were fabricated after the fact.

In light of the above, the magistrate's reliance on Czodor's later allegations, which are inconsistent with the original police report, constitutes a serious error. The initial report provides no evidence linking Petitioner to the alleged threats. This lack of identification is a critical piece of exculpatory evidence that undermines any subsequent claims that Petitioner was responsible for these threats. The withholding of this initial report from Petitioner deprived her of the opportunity to challenge the validity of the subsequent introduction of fabricated text messages and allegations. By failing to disclose this report in a timely manner, the prosecution effectively prevented Petitioner from demonstrating that the initial complaint did not implicate her and that the later evidence presented was inconsistent with the original report.

The initial report, which failed to identify Petitioner as the source of the threats, is precisely the type of exculpatory evidence that should have been disclosed. Its suppression fundamentally prejudiced Petitioner's case by allowing the prosecution to introduce and rely on fabricated text messages and allegations without allowing Petitioner the opportunity to challenge them based on the initial, exculpatory report.

The withholding of this report not only deprived Petitioner of the opportunity to mount a full and fair defense but also allowed the prosecution to build a case on inconsistent and unreliable evidence. As such, this constitutes a clear *Brady* violation, warranting habeas corpus relief from the conviction based on the tainted evidence.

The magistrate's conclusion that there is "no reason to believe that the report would have shown the text messages Petitioner sent to the victim were doctored or that his testimony concerning them was false" is critically flawed and overlooks significant inconsistencies in the evidence. (Dkt. 73 at 69) The magistrate further dismisses the Petitioner's claims as "self-serving speculation," ignoring the fact that the circumstances surrounding the alleged text messages and Czodor's testimony strongly suggest that the evidence was fabricated.

If the text messages later presented by Czodor were genuine and not doctored, they should have been included in the initial report made on September 10, 2018. However, the initial police report, which Czodor filed that day, makes no mention of any text messages or threats from Petitioner. This omission is significant because Czodor testified that he attempted to report Petitioner's threats to post his nude photographs online on September 7, 2018, but was unable to do so because the police station was closed. He claimed that he contacted the police "the following week," which would have been around September 10, 2018, yet the report from that date fails to mention any such threats or text messages.

This inconsistency between Czodor's testimony and the contents of the September 10 report directly contradicts the magistrate's finding that nothing in the report "contradicted that testimony or called it into question." On the contrary, the report's failure to document the alleged threats or text messages—if they indeed existed—strongly suggests that Czodor did not report any such threats on that date. This discrepancy is clear evidence that Czodor's testimony about reporting threats to post

his nude photographs online is false.

Furthermore, Czodor's actions are inconsistent with his testimony. If Czodor genuinely believed he was being threatened by Petitioner, particularly with something as serious as the release of nude photographs, it is implausible that he would fail to mention this when he contacted the police on September 10, 2018. The fact that these allegations only surfaced later indicates that Czodor's story evolved over time, likely as a result of fabricating evidence against Petitioner. This evolution of allegations is clear evidence that the charges were fabricated, not based on genuine threats made by Petitioner.

In sum, the magistrate's conclusions fail to account for the significant inconsistencies between Czodor's testimony and the evidence presented. The omission of any reference to the text messages or threats in the initial report, combined with the delayed and inconsistent nature of Czodor's allegations, strongly supports the argument that the text messages were doctored and that Czodor's testimony is perjury.

See *Ferrara v. U.S.*, 456 F.3d 278, 281 (1st Cir. 2006) (due process violated because prosecutor suppressed exculpatory evidence that manipulated defendant into taking plea agreement); *Fernandez v. Capra*, 916 F.3d 215, 230-31 (2d Cir. 2019) (due process violated because prosecution introduced perjured testimony at defendant's trial such that defendant was prejudiced); *Sims v. Hyatte*, 914 F.3d 1078, 1091-92 (7th Cir. 2019) (due process violated because prosecution withheld material impeachment evidence.)

The September 18, 2018 Police Field Report and the September 24, 2018 Email Exchange (Dkt. 73 at 70)

The magistrate's finding that the September 18, 2018, police field report "showed that Czodor did not report the damage to his door on the night Petitioner came to his house" overlooks critical details. Czodor's statement to the police at 20:09 (Dkt. 6 at 201), where he allegedly described Petitioner "knocking at his front door," makes no mention of any scratching sound, despite later claims of 20 minutes scratching and significant damage to the door. Given the extent of the alleged scratching damage (showing multiple X's and dots scratched into the door), it is implausible that Czodor would not have heard the noise and reported it immediately if it had, in

fact, occurred. This omission constitutes exculpatory evidence, as it casts doubt on Czodor's later account of the event. The withholding of this field report violated Petitioner's constitutional right to a fair trial by depriving her of material evidence that could have impacted the jury's assessment of Czodor's credibility.

The absence of any mention of a scratching sound in the field report strongly suggests that Czodor may have fabricated his later claims of damage to his door. This contradiction would likely have influenced the jury's assessment of Czodor's credibility, making the field report's omission material to Petitioner's defense. The Ninth Circuit has held that even seemingly minor inconsistencies can be material when they form part of the foundation of the prosecution's case, as seen in *Paradis v. Arave*, 240 F.3d 1169, 1179-81 (9th Cir. 2001) (finding Brady violation where prosecutor's notes revealed inconsistency in medical examiner's opinions that would have been useful to impeach examiner's testimony).

Petitioner's trial counsel was deprived of critical evidence to question Czodor about inconsistencies between his initial report to the police and his subsequent testimony about the alleged scratching. The absence of this cross-examination opportunity prevented Petitioner from fully challenging Czodor's credibility and constructing an effective defense, thereby infringing upon her confrontation rights. This is particularly true when prosecution's case is weak. The only hard evidence the prosecution presented, a photo of Czodor's damaged door taken seven days after Petitioner left his house, is far from overwhelming.

The magistrate's conclusion that Petitioner's purported text messages, coupled with the photograph of her pressing a metal key to Czodor's door, establish her intent to harm him and damage his property materially misrepresents the evidence and misleads on critical points.

The photograph allegedly depicting Petitioner pressing a key to Czodor's door does not show any damage to the door. If Czodor had video evidence of Petitioner scratching his door for an extended period, it stands to reason that he would have captured this with visible evidence of the alleged damage. The absence of any photographs showing both Petitioner and visible damage to the door in a single frame raises serious questions about the credibility of Czodor's narrative and the thoroughness of the evidence presented.

The magistrate's conclusion that Petitioner's text messages demonstrate a specific intent to damage Czodor's property lacks sufficient basis in the actual content of these messages. Even if Petitioner expressed animosity or an intent to make Czodor "suffer," such statements are not, on their face, indicative of a plan to damage property. The magistrate's interpretation of the photograph and text messages overstates the evidence against Petitioner by implying a causal link between her animosity toward Czodor and physical damage to his property.

The magistrate's conclusion dismissing the significance of the September 24, 2018 email exchange between Czodor and the website removal company fails to address crucial contextual details that, collectively, cast serious doubt on Czodor's credibility and the veracity of his vandalism claims. This conclusion omits key considerations about the timing of events and related evidence, which, when examined together, strongly suggests that the alleged vandalism might have been fabricated by Czodor.

The email exchange on September 24, 2018, occurred only one day before Czodor took a photograph of the damaged door. If, as Czodor alleges, the damage had already occurred due to Petitioner's actions on September 18, he had ample time to document the damage prior to September 24. His decision to wait until the day following his email exchange with the website removal company raises legitimate concerns regarding the authenticity of the damage and his motives. Evidence of timing or delay in presenting evidence can support an inference of fabrication or manipulation. Unexplained delays in providing evidence is highly relevant to assessing credibility.

Czodor's failure to provide corroborative evidence—such as video or images that include both Petitioner and the damage to the door in a single frame—further undermines his claim. He alleged that Petitioner scratched his door for approximately 20 minutes, yet provided no audio or visual evidence to substantiate this. Additionally, in his initial call to the police and interactions afterward, Czodor did not mention hearing any scratching sounds, a critical omission given the purported extent of the damage. The absence of expected evidence or details can weaken a party's credibility, particularly when the omitted details would naturally support their claim.

The September 18 police field report includes no reference to scratching sounds. This omission is notable because there is no doubt that substantial damage from a metal key would produce audible noise. Here, the omission of contemporaneous observations – despite Czosor alleged Petitioner scratched his door for 20 minutes – raises significant questions about the truthfulness of Czodor's later claims.

In addition to the issues of timing, the possibility that Czodor fabricated the damage to deflect attention from his own misconduct or preemptively create a narrative that would protect him if his wife or other individuals questioned his infidelity merits consideration. Evidence of Czodor's efforts to shift blame could reasonably have influenced the jury's perception of his testimony and overall credibility, especially where his testimony is uncorroborated by other physical evidence. Courts allow inferences related to witness motivation under California Evidence Code § 780, which authorizes the jury to consider the existence of any motive that could affect the witness's credibility. The magistrate's conclusion that the email exchange, in combination with other evidence, lacked relevance fails to account for critical details and timing that cast doubt on Czodor's credibility. The unexplained timing of the photo, combined with the absence of corroborating evidence and failure to report scratching sounds, collectively point to a scenario in which Czodor may have fabricated the alleged vandalism. Properly considered, these factors could have had a material impact on the jury's verdict. Omissions and unexplained delays in presenting evidence can be highly probative, as they can support an inference of manipulation. Therefore, the magistrate's conclusion regarding the insignificance of this evidence overlooks vital context that could have meaningfully impacted the jury's assessment of Czodor's credibility and Petitioner's defense.

Czodor's Prior Misdemeanor Convictions (Dkt. 73 at 71)

In *Kyles v. Whitley*, 514 U.S. 419, 441-42 (1995), the Supreme Court held that the suppression of impeachment evidence that could undermine the credibility of the prosecution's key witness constitutes a violation of the defendant's due process rights. Similarly, the exclusion of Czodor's prior convictions based on dishonesty deprived the jury of evidence that could have undermined its trust in his testimony, thereby prejudicing Petitioner's defense.

The withholding of Czodor's two misdemeanor convictions for contracting without a license and advertising as a contractor without a license violated Petitioner's constitutional right to a fair trial by impairing her ability to impeach Czodor's credibility before the jury. These convictions are directly relevant to Czodor's moral character, which is particularly significant in a case where the Petitioner's conviction hinges heavily on his credibility due to the lack of substantial corroborative evidence.

Misdemeanor convictions are relevant for impeachment to the same extent as felony convictions and may therefore be admitted for that purpose if they reflect "moral turpitude" or a "readiness to do evil." *People v. Wheeler*, 4 Cal.4th 284, 289 (Cal. 1992). Contracting without a license and advertising as a contractor without a license reflect dishonesty and are crimes involving moral turpitude. Czodor's state convictions fall within this realm, as they inherently involve deceit and dishonesty, implicating his character for truthfulness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing, the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

Czodor's convictions, which reveal his willingness to operate outside the law, would likely have influenced the jury's assessment of his credibility, especially given that the prosecution relied heavily on his testimony rather than direct evidence. Preventing a defendant from effectively challenging a witness's credibility violates the Sixth Amendment right to confront witnesses and the Due Process Clause of the Fourteenth Amendment. Had the jury been aware of Czodor's criminal history, they might have been less inclined to believe his unsupported allegations against Petitioner, and more inclined to question the validity of his testimony overall.

The magistrate's conclusions that Petitioner repeatedly admitted to posting Czodor's information online and that there was little doubt she posted his photographs lack evidentiary support and mischaracterize the record:

- **No Concrete Admission**: The magistrate erred in interpreting Petitioner's ambiguous

statement, "I don't recall," in a family court hearing as an admission of posting the photographs. This statement does not equate to an acknowledgment of guilt.

- **Inconsistencies in Czodor's Statements**: Czodor's testimony contains multiple inconsistencies, including his claim that he had not sent nude photographs to anyone else. Given that he is a married man of ten years engaging infidelity, this assertion strains credibility, further supporting the argument that he may have committed perjury. Uncorroborated testimony, especially from a witness with questionable credibility, cannot alone sustain a conviction.

Trial counsel's failure to investigate undermines Petitioner's defense, amounting to ineffective assistance of counsel. The U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 686 (1984), established that failure to introduce crucial impeachment evidence can constitute ineffective counsel if it deprives a defendant of a fair trial. Had the jury known about Czodor's criminal history, they might have assessed his statements with greater skepticism.

The withholding of Czodor's prior misdemeanor convictions deprived Petitioner of her right to a fair trial. Czodor's convictions, coupled with his infidelity, reflect a pattern of dishonesty, should have been available to impeach Czodor, whose credibility was central to the prosecution's case. The magistrate erred in failing to properly address these factors and misrepresenting the factual evidence.

GROUND 7: FALSE EVIDENCE (Dkt. 73 at 73)

Ground 8 is also based on false evidence but the magistrate incorrectly characterized it as prosecutorial misconduct.

Czodor testified that the week following September 7, 2018 (Friday) he reported to the police about Petitioner's threats from her text messages to post his nude photos. Dkt. 4 at 51-52. However, the September 10, 2018 police field report shows a completely different allegation – Czodor reported at 14:34 that he received phone calls from unknown subjects threatening to come to his residence. Dkt. 6 at 200. Such a stark contradiction cannot be dismissed as a "minor discrepancy."

The magistrate's conclusion that the brief notations in the September 10, 2018 police field report do not accurately reflect Czodor's allegations is not supported by the record, and the discrepancies strongly suggest perjury by Czodor regarding his interactions with law enforcement.

The September 10, 2018 police field activity report, documents that Czodor claimed he received calls from unknown individuals threatening to come to his residence. Nowhere does the report indicate that Czodor mentioned Petitioner or threats made by her via text messages to post his nude photos. This is not merely a difference in wording; rather, it is a fundamental deviation in the identity of the alleged threat and its source. Given the importance of accurate information in law enforcement reports, significant inconsistencies in police records, particularly when contradicting a witness's later statements under oath, can be strong evidence of fabrication or perjury.

This discrepancy suggests that Czodor's testimony regarding Petitioner's threats and his report to law enforcement were likely false. If Petitioner had threatened Czodor on September 7, 2018, it is implausible that Czodor would report an entirely unrelated threat from "unknown subjects." Given the importance of this alleged threat to establishing motive or intent in the underlying case, Czodor's failure to consistently report the source of the threat significantly undermines his credibility.

Significant inconsistencies between a witness's account and documented evidence can substantially undermine that witness's credibility. Presenting false testimony violates due process, especially if the false testimony concerns material facts. Here, the magistrate's dismissal of the police field report's notations fails to account for the impact of Czodor's inconsistent statements on his credibility.

Discrepancies in official reports, when weighed against witness testimony, suggest deliberate falsehood or reckless disregard for the truth. Here, the magistrate's conclusion that the police notations may be inaccurate fails to consider that these discrepancies actually support an inference of Czodor's intent to deceive, as the field report does not align with his later testimony.

The magistrate found Petitioner has not shown that the prosecutor knew it was false. Dkt. 73 at 75. However, the prosecutor had access to the September 10, 2018, police field activity report which makes it unlikely the prosecutor did not know Czodor's testimony was false because a simple

comparison of Czodor's testimony (reported to police about Petitioner's threats from text messages the week after September 7, 2018) and the September 10, 2018 police filed activity report (phone calls from unknown subjects threatening to come to his home) is self-explanatory.

Here, the police report's absence of any mention of Petitioner as the source of threats should have been treated as exculpatory evidence in Petitioner's favor, especially since it directly conflicts with Czodor's statements about alleged threats made by Petitioner.

In light of these inconsistencies, it was incumbent upon trial counsel to challenge Czodor's conflicting accounts as part of an effective defense. The magistrate's conclusion that the September 10, 2018 police filed activity report may inaccurately reflect Czodor's report is unsupported by the evidence. The glaring discrepancy between Czodor's testimony of Petitioner's threats and his actual report of calls from "unknown subjects" undermines Czodor's credibility and suggests that his allegations against Petitioner may have been fabricated. The omission of Petitioner's name and any threats from her text messages in the report, the inconsistency in Czodor's testimony, and the lack of scrutiny applied by the magistrate collectively warrant habeas relief.

IAC - (grounds 10 through 18) (Dkt. 73 at 76)

Ineffective assistance of counsel claims are not subject to the strictest procedural forfeiture rules. See *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 689-90 (1984)). In *Harrington*, the Court explained that:

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve.

Id.

The inquiry usually proceeds in three stages.

First, is there merit to the underlying claim? Second, is it likely that the outcome of the trial or sentencing would have been different had counsel presented the claim? Third, is there a good reason why counsel did not pursue the claim during trial or sentencing? When a court can answer yes to the first two questions and no to the third, it is very likely to entertain the habeas petition. *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994).

The magistrate found that it is unclear if Petitioner exhausted two claims of IAC because no state court issued a reasoned decision concerning those claims (grounds eleven and fifteen). Dkt. 73 at 77. However, record shows that Petitioner gave the state courts a "fair opportunity to act" on each of his claims. Dkt. 19-1 at 52, 39-40.

Failure to Present Facts (email and nudist) to the Jury (Ground 11) (Dkt. 73 at 78)

The Court recognized in *Martinez* that determining whether there has been IAC often requires factual development in a collateral proceeding. The Court emphasized that IAC claims can require "investigative work" and development of an "evidentiary basis" that "often turns on evidence outside the trial record." *Martinez v. Ryan,* 132 S. Ct. 1309, 1317 (2012); *cf. id.* at 1318 (explaining that some states require delaying trial-counsel IAC claims until post-conviction proceedings because "[d]irect appeals, without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the claim.").

For example, to determine whether an attorney's performance was deficient, it is often necessary to ask the attorney to state the strategic or tactical reasons for his or her actions. To determine prejudice, it is often necessary to authorize discovery and conduct an evidentiary hearing to assess the effect of the attorney's deficient performance. *Detrich v. Ryan*, 740 F.3d 1237, 1246-47 (9th Cir. 2013).

The magistrate's denial of Petitioner's request for discovery and an evidentiary hearing, followed by the speculative conclusion that trial counsel's strategy was sound, is contrary to legal standards, which require the court to have a factual basis for assessing counsel's performance.

The State provided no hard evidence that Petitioner scratched Czodor's front door. The State's case rests entirely on circumstantial evidence and the testimony of Czodor, which is riddled with inconsistencies, contradictions, and clear evidence of a motive to fabricate his claims. The limited evidence presented, including a photo of Petitioner standing in front of Czodor's undamaged door, a video showing Petitioner tapping the door, and a photo of scratches on the door taken seven days later, is insufficient to prove Petitioner caused the damage.

A photograph showing Petitioner standing in front of Czodor's undamaged door holding a metal key simply places Petitioner near the door but does not establish any connection to the

scratches discovered later. There is no indication from this image that Petitioner used the key to scratch the door or cause any damage. The photograph fails to show any act of vandalism or any damages to Czodor's door. A video showing Petitioner tapping Czodor's front door is in no way equivalent to causing significant scratches or damage. The video does not show any scratching, nor does it indicate any malicious intent. Had there been any, as he later alleged that Petitioner scratched his door for 20 minutes, Czodor would have reported the scratching to the police upon their arrival. He would not have needed to fabricate the claim that darkness prevented him from noticing the scratches, especially since his front door was well-lit. A photograph of scratches on Czodor's front door was taken seven days - a significant lapse of time - after Petitioner had left the premises. Dkt. 6 at 175. The State provided no evidence to suggest that these scratches were caused by Petitioner or that they even existed. Given the time gap, it is entirely possible that the scratches occurred after Petitioner left or were fabricated. In the absence of contemporaneous evidence capturing Petitioner in the act of causing the scratches—despite Czodor's ability to take photos and videos throughout the night while Petitioner was in front of his door—this photograph is inadequate to establish guilt.

Evidence regarding Czodor's dishonesty and the timing of his discovery of the scratches calls into question his credibility and motives. The photo of the scratches was taken after Czodor learned that it would cost him money to remove online comments about his dishonesty. This financial motivation undermines the credibility of his claim that Petitioner caused the damage. The email showing Czodor's knowledge of the cost involved in removing the comments suggests a highly possible motive for fabricating the alleged damage to his door in order to retaliate against Petitioner or shift blame. Trail counsel's failure to present Czodor's email and cross-examine his motive constitutes deficient performance. See *Reynoso v. Giurbino*, 462 F.3d 1099, 1115 (9th Cir. 2006) (explaining that the "failure to cross-examine [a] witness about their motivation for testifying as they did . . . [is] unreasonable").

Czodor's testimony contains several inconsistencies, further calling his credibility into question. Czodor claimed that it was too dark to notice the scratches on the night they allegedly occurred, yet the lighting conditions were impossible to prevent him from seeing the scratches if

they had truly been caused by Petitioner. Additionally, the fact that Czodor only "discovered" the scratches days later raises serious doubts about whether the damage was genuinely caused by Petitioner, or whether it was fabricated after Czodor learned of the financial implications of the online comments.

Czodor claimed that Petitioner scratched his door for 20 minutes. However, the scratches shown in the photograph are inconsistent with such a lengthy and sustained effort. Had Petitioner scratched the door for that amount of time, the damage would likely have been far more severe and Czodor would have reported to the police upon their arrival. This inconsistency between the alleged duration of the scratching and the actual damage casts further doubt on Czodor's narrative.

The inconsistencies in his narrative, combined with his financial motivations and the evidence of his history of dishonesty, suggest that Czodor is a chronic liar and manipulator who cannot be relied upon to provide truthful testimony.

The magistrate erroneously concluded that the evidence corroborating the victim's testimony – including the video of the victim trying to convince Petitioner to leave his house the night the door was vandalized, the still photograph of Petitioner pressing a metal key to his door, and Petitioner's various text messages – was overwhelming. Dkt. 73 at 79. The evidence cited by the magistrate does not establish that Petitioner vandalized Czodor's door; it merely confirms that Petitioner was present in front of Czodor's door. This is far from the "overwhelming" evidence needed to support the conclusion of guilt, as the magistrate suggests. The mere fact that Petitioner was present at the scene does not prove that she caused the scratches on the door, and thus this evidence cannot be considered overwhelming.

The State provided no credible evidence that Petitioner disseminated Czodor's nude photos or Czodor suffered emotional distress from their dissemination. See *Fiore v. White*, 531 U.S. 225, 228-29 (2001) (per curiam) (habeas relief possible because due process violated by conviction of defendant without proving each element of crime beyond reasonable doubt.)

Failure to Request a Dating-Relationship Instruction and Stipulating to Validity of the Family Court's Protective Order (Grounds 12 and 13) (Dkt. 73 at 81)

Although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence. *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). See also *United States v. Martin Linen Supply Co*., 430 U.S. 564, 572-573 (1977); *Carpenters v. United States*, 330 U.S. 395, 410 (1947).

What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. It is self-evident that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993).

The prosecution bears the burden of proving all elements of the offense charged, see, e.g., *Patterson v. New York*, 432 U.S. 197, 210 (1977); *Leland v. Oregon*, 343 U.S. 790, 795 (1952), and must persuade the factfinder "beyond a reasonable doubt" of the **facts necessary to establish each of those elements**, see, e.g., *In re Winship*, 397 U.S. 358, 364 (1970); *Cool v. United States*, 409 U.S. 100, 104 (1972) (per curiam). This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common law jurisdictions, applies in state, as well as federal, proceedings. *Winship*, supra.

The proposed dating-relationship instruction was obviously pertinent to determining whether Czodor was involved in a relationship that created a reasonable expectation of privacy in his nude photos sent to Petitioner and to assessing the validity of the family court orders, elements of violation of a protective order (Pen. Code,§ 273.6(a)) and disorderly conduct (unlawful dissemination of private photographs and recordings) (Pen. Code, § 647(j)(4))(A). Dkt. 33 at 31-32, 57-58.

The magistrate's conclusion that Petitioner's IAC claims fail because they involved strategic decisions by trial counsel is erroneous and unsupported by the record. While decisions regarding trial strategy are generally given deference under *Strickland v. Washington*, 466 U.S. 668 (1984), counsel's decisions in this case were objectively unreasonable. The magistrate's reasoning, which suggests that trial counsel's failure to request a dating-relationship instruction and his decision to stipulate to the validity of the family court's protective order were strategic, is contradicted by the record and established legal authority.

As explained in *Reynoso v. Giurbino*, 462 F.3d 1099, 1115 (9th Cir. 2006), habeas courts are not required to defer to strategic decisions when no reasonable justification for such decisions is provided.

In this case, despite being asked, trial counsel failed to provide any explanation for stipulating to the validity of the orders. Dkt. 6 at 207. This absence of explanation undermines the magistrate's assumption that the decision was strategic. The California Supreme Court in *People v. Pope*, 23 Cal.3d 412 (1979), clarified that when counsel is asked to explain a tactical decision and fails to provide a justification, this lack of explanation can be interpreted as a sign that counsel had no reasonable basis for the decision. See also *Moore v. Johnson*, 194 F.3d 586, 610 (5th Cir. 1999) (holding that a particular decision could not be labeled "strategic" where, inter alia, the attorney had "no idea" why the decision had been taken); *Bean v. Calderon*, 163 F.3d 1073, 1079 (9th Cir. 1998) (noting that a decision cannot be characterized as "strategic" where it was a result only of "confusion"); and *Loyd v. Whitley*, 977 F.2d 149, 158 n. 22 (5th Cir. 1992) (distinguishing between "strategic judgment calls" and "plain omissions") (collecting cases); and compare *United States v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989) ("counsel's behavior was not colorably based on tactical considerations but merely upon a lack of diligence"); *Moore*, 194 F.3d at 615 (describing a "strategic" decision as, inter alia, a decision "that . . . is expected . . . to yield some benefit or avoid some harm to the defense.") A straightforward application of these principles reveals the extent of the magistrate's error.

Stipulating to the validity of the protective orders without challenging their lawfulness was objectively unreasonable, especially considering the lack of a dating relationship that would have provided grounds to argue that the family court orders were void.

The magistrate erroneously concluded that there was no need to request a dating-relationship instruction, reasoning that the existence of a dating relationship is not an element of the crime of violating a protective order. However, this conclusion overlooks a critical element of the offense under California Penal Code § 273.6(a), which requires that a lawful court order be in place. The validity of the Temporary Restraining Order (TRO) and Domestic Violence Restraining Order (DVRO) against Petitioner is contingent upon the family court's jurisdiction to issue those orders,

which, in this case, was dependent on the existence of a dating relationship between Czodor and Petitioner. (See Dkt. 3 at 159 (CALCRIM 2701, setting forth the requisite elements to prove that Petitioner violated a "protective or stay away order")); Cal. Penal Code § 273.6(a).

Trial courts have a sua sponte duty to instruct on "the general principles of law relevant to and governing the case." *People v. Cummings* (1993) 4 Cal.4th 1233, 1311. "That obligation includes instructions on all of the elements of a charged offense" (ibid.), and on recognized "defenses . . . and on the relationship of these defenses to the elements of the charged offense." *People v. Sedeno* (1974) 10 Cal.3d 703, 716, overruled on other grounds by *People v. Breverman* (1998) 19 Cal.4th 142, 178, fn. 26. In this case, whether there was a qualifying dating relationship between Czodor and Petitioner for the family court to issue valid TRO and DVRO and for Czodor to expect privacy in his nude photos sent to Petitioner is an element of the offense and a defense.

In *People v. Flood*, 18 Cal.4th 470, 481 (1998), the California Supreme Court held that questions of fact related to the elements of a crime must be resolved by the jury, not the judge. The existence of a dating relationship is a factual element that should have been considered by the jury in determining whether the family court had jurisdiction to issue its protective orders. By stipulating to the validity of the protective orders, trial counsel deprived the jury of its role as fact-finder on this critical issue. This denial of the jury's duty to decide the facts of the case violates Petitioner's right to a jury trial under both the U.S. Constitution's Sixth Amendment and the California Constitution, Article I, § 16.

Similarly, in *People v. Modesto* (1963) 59 Cal.2d 722 [31 Cal.Rptr. 225, 382 P.2d 33], speaking of the effect of the lack of instruction on the included offense of manslaughter, the court said (at p. 730): "Reversal is not required because of a reasonable probability that in the absence of the error the jury would have reached a different verdict (see *People v. Watson*, 46 Cal.2d 818, 836 [299 P.2d 243]), but because the defendant has a constitutional right to have the jury determine every material issue presented by the evidence. Regardless of how overwhelming the evidence of guilt may be, the denial of such a fundamental right cannot be cured by article VI, section 4 1/2, of the California Constitution, for the denial of such a right itself is a miscarriage of justice within the meaning of that provision." In petitioner's case, there has been no jury verdict within the meaning of

the Sixth Amendment, the premise for harmless error analysis is absent. *Sullivan v. Louisiana*, 508 U.S. 275, (1993).

The inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be — would violate the jury-trial guarantee. See *Rose v. Clark*, 478 U.S. 570, 578 (1986); id., at 593 (BLACKMUN, J., dissenting); *Pope v. Illinois*, 481 U.S. 497, 509-510 (1987) (STEVENS, J., dissenting).

Here, the jury was left with no instruction on the critical issue of whether the family court's protective orders were lawfully issued, and they were not given the opportunity to assess whether a dating relationship existed. Furthermore, the stipulation to the validity of the protective orders prevented Petitioner from challenging the orders' lawfulness and whether there was a relationship engendering a reasonable expectation of privacy in Czodor's nude photos sent to Petitioner, which were central to Petitioner's defense.

Had trial counsel requested the dating-relationship instruction and contested the validity of the protective orders, there is a reasonable probability that the outcome of the trial would have been different. The jury could have found that there was no qualifying dating relationship between Czodor and Petitioner engendering a reasonable expectation of privacy, the family court orders were issued without jurisdiction, which would have resulted in Petitioner's acquittal of disorderly conduct (unlawful dissemination of private photographs and recordings) (Pen. Code, § 647(j)(4))(A) and violating those orders under California Penal Code § 273.6(a).

Failure to Move to Exclude Petitioner's Family-Court Testimony (Ground 14) (Dkt. 73 at 83)

The magistrate found that trial counsel objected to the testimony and initially convinced the trial court to exclude it. Dkt. 73 at 83. This is factually misleading and incomplete. Trial counsel objected to the transcript of the restraining order being admitted based on proffered Evidence Code 352 instead of Fifth Amendment. Dkt. 3 at 241. When being asked by the trial court if he would be

objecting to statements that Petitioner made in the family court transcript being introduced, trial counsel answered he would but just based on hearsay instead of Fifth Amendment. Dkt. 3 at 242. When the prosecution specified the statements made by Petitioner he intended to introduce at trial, trial counsel still made no objection based on Fifth Amendment. Dkt. 3 at 243-244. The trial court clearly stated that there was no indication that Petitioner fully understood the consequences of making incriminating statements during the course of the family court hearing. In addition, Petitioner did not have legal counsel at that hearing. Dkt. 3 at 246.

The magistrate found the trial court ruled that the prosecutor could question the victim about Petitioner's testimony. Dkt. 73 at 83. In support his argument, the prosecution cited *People v. Battaglia*, 156 Cal.App.3d 1058, 1065 (Cal. Ct. App. 1984) in which William Ruiz, a licensed clinical social worker and full time employee at the emergency walkin psychiatric unit, was not acting as a state agent. A scenario completely distinct from this case. Then the prosecution asserted that coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment, citing *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Dkt. 3 at 278. However, this argument overlooks the broader protections provided under the Fifth Amendment. The Fifth Amendment not only guards against involuntary self-incrimination in criminal prosecutions but also extends its privilege to any official questioning in other proceedings—civil or criminal, formal or informal—where responses may potentially incriminate the individual in future criminal proceedings. This principle was established in *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924), where the Court recognized that the Fifth Amendment privilege against self-incrimination applies beyond criminal trials.

In this case, the prosecution's reliance on the assertion that Petitioner's statements were voluntary due to the absence of coercive police activity is misplaced. Although Petitioner was summoned to appear in family court, the prosecution inaccurately claimed that Petitioner was not required to be present, voluntarily chose to attend, and voluntarily spoke at the hearing. These assertions are both factually and legally incorrect. Petitioner's appearance at the hearing and her statements, regardless of the proceeding's nature, still invoke the protections of the Fifth Amendment because the family court setting and the content of her testimony could have subjected

her to future criminal liability.

Furthermore, the prosecution's argument fails to account for the reality that the Fifth Amendment privilege is not limited to custodial situations. As the Supreme Court emphasized in McCarthy, the privilege applies in any scenario where answering questions could lead to self-incrimination, whether or not the individual is in custody. Thus, the prosecution's contention is fundamentally flawed, and Petitioner's Fifth Amendment rights should have been considered, irrespective of whether coercive police activity was involved.

By introducing Petitioner's prior testimony from the family court hearing into evidence in the criminal trial, the State effectively transformed the family court proceeding into the equivalent of a criminal trial. Trial counsel's failure to object to the use of that testimony, based on Petitioner's Fifth Amendment privilege against self-incrimination, constituted unreasonable and constitutionally ineffective assistance of counsel.

In *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972), the U.S. Supreme Court emphasized that compelled testimony cannot be used, either directly or indirectly, in any criminal case against the individual. The failure of Petitioner's trial counsel to invoke this established protection by excluding her prior testimony at the family court hearing demonstrates constitutionally ineffective representation.

Trial counsel's failure to object to the use of Petitioner's family court testimony is particularly unreasonable in light of the high likelihood that the testimony could be incriminating in the subsequent criminal case. The legal standards governing ineffective assistance of counsel claims, as articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), require that counsel's performance meet an objective standard of reasonableness under prevailing professional norms. In this case, trial counsel's failure to raise a clear and valid Fifth Amendment objection was objectively unreasonable and fell below the standard of competent legal representation.

Additionally, Petitioner was prejudiced by counsel's failure to act. The use of her prior testimony influenced the jury's assessment of the evidence and the ultimate verdict. Under the *Strickland* standard, the ineffective assistance of counsel is prejudicial when there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.

Given the incriminating nature of the testimony and its impact on the case, Petitioner has met the prejudice prong of the *Strickland* test.

In conclusion, trial counsel's failure to exclude Petitioner's prior family court testimony, based on her Fifth Amendment privilege, was both unreasonable and constitutionally ineffective. This failure violated Petitioner's right against self-incrimination and prejudiced her defense, warranting habeas relief.

Failure to Expose the Victim's False Testimony and Inconsistent Statements and Call Defense Witnesses (Grounds 15 and 16)) (Dkt. 73 at 83)

The photo taken in front of Czodor's door was well-lit, to the extent that the light showered Petitioner from head to toe. Dkt. 6 at 159. The magistrate clearly erred in concluding no evidence established that Czodor lied about it being too dark to see the damage to the door. Dkt. 73 at 84.

The magistrate found although Petitioner also alludes to the September 10, 2018 police field report at issue in her first *Brady* claim, she presents no argument showing how trial counsel's performance was deficient in relation to that report. Dkt. 73 at 84. However, it's self-explanatory that trial counsel failed to investigate.

The magistrate erred in concluding that the introduction of the September 18, 2018 report into evidence would not have had any impact on the jury's verdict. In *People v. Hall*, 62 Cal.2d 104, 41 Cal. Rptr. 284, 396 P.2d 700 (Cal. 1964), the California Supreme Court held that the absence of expected evidence can support an inference of innocence if such evidence would naturally be present. In *Hall*, the court emphasized that the "failure to find" certain evidence or for expected circumstances to appear in the evidence presented can bolster an argument against the validity of the accusations, especially when the alleged events would logically generate particular evidence or reactions if they occurred as claimed. This reasoning can be analogously applied to Petitioner's case, where the lack of a contemporaneous police report regarding alleged noises strengthens Petitioner's argument that the allegations were fabricated.

Czodor alleged that Petitioner scratched his front door with a metal key for a prolonged period, presumably generating a loud and continuous sound. Under the reasoning in *Hall*, one would expect Czodor to have immediately reported such disturbing conduct to the police,

particularly given his immediate access to law enforcement. Yet, the September 18, 2018 police field activity report contains no mention of any noise complaint or suspicion of property damage caused by Petitioner, despite this being a situation that would likely prompt a report. This absence of a report under circumstances where it would be anticipated supports the inference that the event may not have occurred as claimed and raises questions about the credibility of Czodor's later statements.

Further, the timing of Czodor's allegations raises substantial questions regarding their credibility. Czodor received an email on September 24, 2018, detailing the cost to remove online comments regarding his dishonesty. His claims regarding the scratched door only surfaced after this email was exchanged. This context suggests a strong motivation for Czodor to fabricate claims against Petitioner as a retaliatory measure rather than a factual recounting of actual events.

Relying on *Dows v. Wood*, 211 F.3d 480, 486 (9th Cir. 2000), in which there is no evidence in the record that the potential witness actually exists, the magistrate concluded Petitioner provided no declaration from any of potential witness demonstrating a willingness to testify and setting forth the facts to which they would have testified. However, notably distinguished from *Dows*, the potential witnesses here are police officers, making it impossible that they don't actually exist. In addition, they should have been subpoenaed to testify at trial regardless of their willingness. They were present at the scene. It's self-explanatory that they would have testified what they seen on the night on September 18, 2018. Therefore, the magistrate's reliance on *Dows* is misplaced.

Failure to Object (Ground 17) (Dkt. 73 at 85)

The Sixth Amendment and article I, section 15 require counsel's "diligence and active participation in the full and effective preparation of his client's case." *People v. Vest* (1974) 43 Cal.App.3d 728, 736 [118 Cal.Rptr. 84]. Criminal defense attorneys have a "duty to investigate carefully all defenses of fact and of law that may be available to the defendant. . . ." *In re Williams* (1969) 1 Cal.3d 168, 175 [81 Cal.Rptr. 784, 460 P.2d 984]. This obligation includes conferring with the client "without undue delay and as often as necessary . . . to elicit matters of defense. . . ." *Coles v. Peyton* (4th Cir. 1968) 389 F.2d 224, 226. "Counsel should promptly advise his client of his

rights and **take all actions** necessary to preserve them. . . . Counsel should also be concerned with the accused's right to be released from custody pending trial, and be prepared, where appropriate, to make motions for a pretrial psychiatric examination or for the suppression of evidence. [Fns. omitted.]" *United States v. DeCoster* (D.C. Cir. 1973) 487 F.2d 1197, 1203; *People v. Whittington* (1977) 74 Cal.App.3d 806, 818-819, fn. 6 [141 Cal.Rptr. 742]. If counsel's failure to perform these obligations results in the withdrawal of a crucial or potentially meritorious defense, "`the defendant has not had the assistance to which he is entitled.'" *In re Saunders* (1970) 2 Cal.3d 1033, 1042 [88 Cal.Rptr. 633, 472 P.2d 921].

Ineffective assistance can be established by an attorney's forfeit of legal claims. See, e.g., *Miller v. Webb*, 385 F.3d 666, 674-75 (6th Cir. 2004) (holding that trial counsel's failure to challenge a juror for cause after the juror made a statement that she thought she could be fair, but immediately qualified the statement with a statement of partiality, was "objectively unreasonable").

A defendant must show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates and establish that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense.

Once these burdens have been met, the reviewing court must look to see if the record contains any explanation for the challenged aspect of representation. If it does, the court must inquire whether the explanation demonstrates that counsel was reasonably competent and acting as a conscientious, diligent advocate. For example, where the record shows that counsel's omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed. (E.g., *People v. Fain* (1969) 70 Cal.2d 588, 600 [95 Cal.Rptr. 562].) In contrast, where the record shows that counsel has failed to research the law or investigate the facts in the manner of a diligent and conscientious advocate, the conviction should be reversed since the defendant has been deprived of adequate assistance of counsel.

Although the magistrate faults Petitioner for her failure to lodge the voir dire transcript, the currently available record has already shown that counsel's omission was not a result from an informed tactical choice. Dkt. 4 at 4-6. Juror No. 4 clearly indicated that he's not paid for jury duty, he had a financial hardship and he didn't want to be on jury duty anymore. He had anxiety so he's

not used to talking in front of other people so he didn't speak up. His dad was basically out of work and his mom worked part time and so he could not miss work because he's supporting his parents.

Impartiality is not only determined by a juror's lack of bias toward the parties or issues in the case, but also by the juror's capacity to fairly evaluate the evidence without undue personal or emotional stress. Juror No. 4's anxiety, financial hardship, and fear to speak up created circumstances that rendered it unreasonable to expect that he could serve as an impartial juror. Anxiety, especially in conjunction with financial pressure, can impair a juror's ability to carefully deliberate on the evidence, particularly when the juror is eager to conclude the proceedings due to personal circumstances. The court's failure to excuse Juror No. 4 in light of these factors violated Petitioner's Sixth Amendment right to an impartial jury. The trial judge, having been made aware of these issues, should have engaged in a more thorough inquiry into whether Juror No. 4 could serve without his impartiality being compromised. The trial judge made no effort to ensure Juror No. 4 could remain impartial, merely expressing sympathy for his financial hardship. The decision to compel Juror No. 4 to remain on the jury was not based on his ability to be impartial despite his financial hardship and anxiety; rather, the judge required him to stay solely because he had already been sworn in as a juror.

Here, the record directly refutes the contention that trial counsel made a strategic decision. Trial counsel's failure to adequately advocate for Juror No. 4's excusal fell below the standard of reasonably competent attorneys. Counsel's decision to submit the issue to the court without fully inquiring Juror No. 4's anxiety and financial concerns—factors that could affect his ability to deliberate fairly—was a clear failure to act diligently. Reasonable counsel would have advocated for the juror's removal due to his hardship, anxiety and fear to speak up, rather than passively deferring to the court's discretion.

Juror No. 4's inability to speak freely due to anxiety and his financial situation increased the likelihood that his vote was motivated by a desire to quickly end the trial rather than by a genuine belief in the defendant's guilt. The magistrate's conclusion that Juror No. 4 did not explicitly express that he voted guilty due to pressure is insufficient, given his fear to speak up. Juror No. 4's

anxiety, hardship, and fear to speak up alone make it unreasonable to assume he could deliberate impartially.

The magistrate determined that Juror No. 4 only missed one day of work, noting that the jury delivered its verdict on July 29, 2021, at 3:29 p.m., less than twenty-six hours after Juror No. 4 requested to be excused. However, the record shows that the jury was out at 3:35 p.m. Dkt. 4 at 210. There was no evidence to suggest that Juror No. 4 could immediately return to work at 3:45 p.m. which was close to the end of the business day.

Crucially, there were two alternate jurors available who could have replaced Juror No. 4. This fact strengthens the argument that, had trial counsel objected to the court's decision not to excuse Juror No. 4, the court would have been reasonably inclined to reconsider its ruling and allow one of the alternate jurors to take his place.

In *People v. Pope*, 23 Cal.3d 412 (1979), the California Supreme Court established that when counsel is asked for an explanation for their actions and fails to provide one, this strongly suggests there was no reasonable tactical basis for the decision. In this case, despite being asked, trial counsel provided no explanation for failing to support Juror No. 4's excusal. Dkt. 6 at 209. Trial counsel's performance was objectively unreasonable in light of his knowledge of Juror No. 4's anxiety, financial hardship and fear to speak up, coupled with the absence of any explanation for counsel's action and inaction after being asked. *Reynoso v. Giurbino*, 462 F.3d 1099, 1115 (9th Cir. 2006). The magistrate's speculative conclusion that trial counsel may have strategically believed Juror No. 4 to be advantageous is unsupported by the record and contrary to the reasoning in *Pope* and *Reynoso*.

Failure to Ensure Petitioner's Right to a Speedy Trial (Ground 18) (Dkt. 73 at 88)

In concluding that Petitioner was not denied her right to a speedy trial, the magistrate failed to apply the tests set forth in *Barker v. Wingo* (1972) 407 U.S. 514 and *Mathews v. Eldridge* (1976) 424 U.S. 319. Dkt. 73 at 88-89.

The magistrate's conclusion that there was no evidence supporting Petitioner's claim that she did not personally and voluntarily waive time is factually incorrect. Petitioner provided a declaration under penalty of perjury, which is an acceptable form of evidence under both California

and federal law. Dkt. 33 at 109-110. A declaration under penalty of perjury is treated as substantive evidence and can serve as the basis for establishing facts in a legal proceeding. (See 28 U.S.C. § 1746; Cal. Code Civ. Proc. § 2015.5).

The magistrate essentially placed the credibility of Petitioner and her trial counsel under scrutiny. However, in assessing the credibility of the public defender, the magistrate made a critical omission—when the public defender was asked to explain the investigation conducted for each period during which time waivers were entered, they provided no explanation whatsoever, suggesting no legitimate reasons for continuing the trial date. Dkt. 6 at 209.

Moreover, it did not appear from the record that the continuances, two years in total, were sought for actual trial preparation. Trial counsel's minimal performance during trial further corroborates Petitioner's claim that public defender conducted minimal trial preparation during the two years of the case's pendency prior to jury selection. This deficiency in preparation suggests that Petitioner did not voluntarily waive her right to a speedy trial but was instead left uninformed and inadequately represented. Under California law, a waiver of time must be made knowingly, voluntarily, and intelligently (*People v. Johnson*, 26 Cal.3d 557, 566 (1980)), and the absence of any meaningful explanation or investigation undermines the claim that Petitioner personally waived time on multiple occasions and the validity of any purported waivers.

The magistrate's failure to fully evaluate the public defender's lack of trial preparation and failure to provide explanations for the time waivers raises substantial doubt about the voluntariness of Petitioner's waiver of time, rendering the conclusion legally and factually unsound.

The magistrate acknowledged that Petitioner's first trial date was set for March 24, 2020, and justified the continuance of the trial due to the COVID-19 pandemic. However, this conclusion lacks both a factual and legal basis. The record clearly demonstrates that the COVID-19-related jury trial suspension lasted only two months, yet Petitioner's trial was delayed for two years. Dkt. 6 at 218. This extended delay cannot be attributed solely to the pandemic, as the continuance far exceeded the reasonable time caused by the public health emergency.

The magistrate concluded that Petitioner failed to demonstrate resulting prejudice. However, delay that is "uncommonly long" triggers a presumption of prejudice. *Doggett v. United States*

(1992) 505 U.S. 647, 651- 657. The magistrate further faulted Petitioner for not explaining how her public defender's failures—such as not calling any witnesses, inadequately cross-examining the victim, and failing to present evidence from any investigation—were connected to the denial of her right to a speedy trial. However, this argument is flawed. It is self-evident that the public defender's lack of investigation during the two-year pendency of the case prior to jury selection highlights the unjustified nature of the trial's continuance. These failures underscore that the continuance was unjustified, as no meaningful preparation was undertaken during this extended period.

Furthermore, under established precedent, a defendant need not identify specific prejudice from an unreasonable delay in bringing the case to trial once the speedy trial right has attached. See *Moore v. Arizona*, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973) (per curiam) (finding "fundamental error" in a ruling by the Arizona Supreme Court that a showing of prejudice to the defense at trial was essential to establish a federal speedy trial claim.) The mere passage of time in combination with the absence of a legitimate justification for the delay can be sufficient to demonstrate a violation.

Failure to Investigate and Adequately Cross-Examine the Victim (Ground 10) (Dkt. 73 at 89)

The magistrate concluded that Czodor's prior convictions were irrelevant without addressing the critical fact that this case was built solely on Czodor's credibility as the only witness. Where a case hinges on witness credibility, prior convictions - based on dishonesty - become particularly relevant. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court noted that prejudice can be shown when counsel's deficient performance prevents the jury from hearing evidence that could impact its credibility determination. In this case, by omitting Czodor's prior convictions, the jury was deprived of important information that could have cast doubt on his reliability.

Moreover, credibility is paramount when a case relies on the testimony of a single witness. The magistrate's anecdotal of Czodor's prior convictions is therefore not only factually flawed but also inconsistent with controlling legal authority. The jury, had it known of Czodor's past dishonesty, would have been in a better position to assess whether his testimony could be trusted.

The magistrate also erroneously concluded that, even if admitted, Czodor's prior convictions would not have affected the jury's assessment of his credibility. This conclusion is unsupported by the facts of the case. Czodor's testimony was the linchpin of the prosecution's case, and his credibility was the sole determining factor for the jury's verdict. Given the absence of any independent evidence linking Petitioner to the crimes, the jury's verdict necessarily turned on whether it believed Czodor's version of events.

Courts have recognized that evidence affecting the credibility of a key witness can have a profound impact on the outcome of a trial. The duty to investigate is especially pressing where, as here, the complaining witness and his credibility are crucial to the State's case. See *Huffington v. Nuth*, 140 F.3d 572, 580 (4th Cir.1998) (collecting cases).

One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing, the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. *Davis v. Alaska*, 415 U.S. 308, 316 (1974). This is particularly true when the prosecution's case depends on the witness's credibility, as it does here with Czodor. The jury must have the opportunity to make a full assessment of the witness's "credibility, reliability, and motivation" because prior convictions inform a witness's general credibility and reliability. *Davis* established that general credibility, as influenced by past misconduct, is relevant and essential for assessing the overall truthfulness of a witness's testimony.

Under *People v. Castro*, 38 Cal. 3d 301, 315 (1985), evidence of past convictions can be introduced for the purpose of impeaching a witness's credibility, particularly when these convictions reflect on a witness's honesty or integrity. Especially in cases hinging on testimonial evidence, a witness's credibility must be fully evaluated to ensure a fair trial. See also *People v. Burns* (1987) 189 Cal.App.3d 734 (20-year conviction not necessarily remote because of subsequent lawlessness); *People v. DeCosse* (1986) 183 Cal.App.3d 404 (no abuse of discretion to admit a burglary conviction from twelve years earlier).

Although trial counsel is typically afforded leeway in making tactical decisions regarding

trial strategy, counsel cannot be said to have made a tactical decision without first procuring the information necessary to make such a decision. *Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006). See *Williams v. Washington*, 59 F.3d 673, 681 (7th Cir.1995) ("Because investigation [of the witnesses] might have revealed evidence bearing upon credibility (which counsel believed was the sole issue in the case), the failure to investigate was not objectively reasonable."); *cf. Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir.1994) ("Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made." (citations, emphasis, and internal quotation marks omitted))

The magistrate found trial counsel's failure to address the reason why Czodor could not provide digital evidence with metadata justified and no evidence suggests that any of the evidence presented at trial was manipulated or incomplete. Dkt. 73 at 90.

Given social media's pervasiveness in our culture, and the frequency with which people use it compared to other forms of communication, social media evidence is a broader and deeper trove of courtroom evidence than has ever been available before. At the same time, however, social media evidence is uniquely vulnerable to alteration or forgery, particularly as advances in technology allow so-called "bot" accounts to create social media content autonomously. *See, e.g.,* Onur Varol et al.,*Online Human-Bot Interactions: Detection, Estimation, and Characterization*, ARXIV:1703.03107v2 [cs.SI] (Mar. 27, 2017). Offering text messages, instant messages, tweets, and social media posts of all types at trial is now commonplace. In *United States v. Vayner*, 769 F.3d 125, 131 (2d Cir. 2014) the U.S. Second Circuit Court of Appeals reversed a district court's decision to admit screenshots from a social media profile that contained the defendant's name, photo, and work history. *Vayner* holds that merely presenting evidence proving that a post came from a particular user's account is insufficient to authenticate the post as actually coming from that user. In June 2020, the American Bar Association reported on a British family law proceeding in which a party doctored a recording of her spouse to make it sound like he was threatening her. Matt Reynolds, *Courts and lawyers struggle with growing prevalence of deepfakes*, ABA J. (June 9, 2020). See also *U.S. v. Jackson*, 208 F.3d 633,636 (7th Cir. 2000); *Griffin v. State*, 19 A.3d 415,423

(Md. 2011); *Com. v. Purdy*, 945 N.E.2d 372, 381 (Mass. 2011).

Metadata is a primary factor in confirming a file's origin, date, and content. If Czodor's print-out was intended to be used against Petitioner, the absence of digital evidence undermines the authentication process. Given the simplicity of providing metadata, withholding it here raises serious concerns regarding his intent and the credibility of the evidence. The deliberate decision to withhold digital evidence containing metadata suggests a strong intent to obstruct Petitioner's access to crucial information needed to ensure a fair trial.

Czodor's motivation for his failure to provide digital evidence could have exposed inconsistencies in Czodor's testimony, supporting Petitioner's right to a fair trial. Counsel's failure to cross-examine the witness about his motivation for testifying as he did was, accordingly, equally unreasonable and cannot be considered "sound trial strategy." *Reynoso v. Giurbino*, 462 F.3d 1099, 1115 (9th Cir. 2006). The magistrate's recommendation disregards how easy it is to present digital evidence with metadata, overlooking the significant implications of Czodor's failure to include it.

Similar to the absence of digital evidence, the absence of texts messages regarding the agreement to keep his nude photos private permits a negative inference regarding the authenticity and completeness of the evidence presented and entitles Petitioner to an adverse inference regarding Czodor's credibility and motive, and any resulting prejudice should be weighed in favor of Petitioner's right to a fair trial. The magistrate's reliance on counsel's closing argument to mitigate the failure to question Czodor effectively does not address the impact of failing to elicit a definitive answer from Czodor on cross-examination. Closing arguments are insufficient to remedy critical errors made during trial, particularly where effective cross-examination could have changed the jury's perception of the evidence. A belated attempt to raise this issue in closing fails to adequately counter the prejudicial effect of an unchallenged assumption of privacy.

The magistrate concluded that had counsel elicited testimony about the victim's marriage, it would not have benefited Petitioner defense or made her any less culpable. Dkt. 73 at 91. However, Czodor's willingness to go on dates with Petitioner while married could reflect on his character for honesty, casting doubt on his integrity and, potentially, his entire narrative. Since Czodor's credibility is pivotal to the prosecution's case, details that challenge his integrity—such as his

dishonesty toward his spouse and his pattern of behavior in interacting with multiple women—are highly relevant and admissible for impeachment purposes. Questions about Czodor's extramarital conduct would not only have been permissible but also relevant to establishing a pattern that may call his integrity and truthfulness into question. In *United States v. Abel*, 469 U.S. 45, 52 (1984), the Supreme Court noted that credibility attacks on a witness are permissible when they help the fact-finder evaluate the witness's motivations or propensity for honesty. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony. The "common law of evidence" allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to "take the answer of the witness" with respect to less favored forms of impeachment. *See generally* E. Cleary, McCormick on Evidence § 40, p. 89 (3d ed.1984); Hale, Bias as Affecting Credibility, 1 Hastings L.J. 1 (1949).

Czodor's marital strain, if it existed, is entirely his responsibility, due to his own infidelity. Infidelity and deceit are relevant factors in assessing a witness's character and credibility, particularly when these actions involve dishonesty, concealment, or self-serving motives. Under California Evidence Code § 780, jurors may consider a witness's motive, interest, and relationship to the case in weighing their testimony. Czodor's decision to date Petitioner while married suggests a willingness to deceive his spouse, which bears directly on his credibility as a witness. Courts have also recognized that personal misconduct, such as infidelity, may indicate a character for dishonesty, as in *People v. Wheeler*, 4 Cal. 4th 284, 296 (1992), where the court permitted the impeachment of a witness with prior dishonest acts. Misconduct involving moral turpitude may suggest a willingness to lie (see *People v. Castro* (1985) 38 Cal.3d 301, 314-315 [211 Cal.Rptr. 719, 696 P.2d 111]; *People v. White* (1904) 142 Cal. 292, 294 [75 P. 828]; *People v. Carolan* (1886) 71 Cal. 195, 196 [12 P. 52]; *Gertz v. Fitchburg Railroad* (1884) 137 Mass. 77, 78).

Jurors may consider a witness's personal motives and misconduct if they may lead the witness to fabricate or exaggerate claims. Czodor's infidelity, and the potential marital strain it created, are thus self-inflicted and irrelevant to Petitioner's actions. In fact, Petitioner is another

victim of Czodor's infidelity. The possibility that Czodor fabricated allegations to appease his spouse or minimize the consequences of his infidelity is highly relevant and should have been explored. If Czodor faced the discovery of his infidelity by his spouse, he might have had a compelling motive to shift blame to Petitioner in order to minimize the personal repercussions. Jurors may consider motives that a witness may have to fabricate testimony, especially when they stand to benefit from such deception.

The exploration of potential motives to fabricate is permissible, particularly where there is a personal incentive to deflect blame or mitigate personal wrongdoing. In *Napue v. Illinois*, 360 U.S. 264, 269 (1959), the U.S. Supreme Court emphasized that jurors must be fully informed of any potential bias or motives of a witness to testify untruthfully. Czodor's potential interest in deflecting blame onto Petitioner is thus relevant to the jury's full understanding of his credibility and should not have been dismissed by concerns about discussing his marital strain.

The magistrate's reliance on the idea that questioning Czodor's marriage would result in damaging testimony is legally flawed. Czodor's marital strain, if it existed, was a product of his own actions, not Petitioner's. The possibility that Czodor fabricated allegations to deflect blame from his infidelity is both factually plausible and legally relevant.

Given the inadequacy of counsel's investigation into Czodor's motives for testifying against Petitioner, his failure at trial to cross-examine Czodor about his marriage and the absence of Lilly on his Yelp page further rendered his performance deficient. *Reynoso v. Giurbino*, 462 F.3d 1099, 1114 (9th Cir. 2006) (counsel's conduct was deficient under *Strickland*.)

Prejudice was found even when the prosecution's case has been stronger than in the instant case. See *Rios v. Rocha*, 299 F.3d 796, 810–13 (9th Cir.2002) (holding that counsel's failure to investigate and present witnesses was prejudicial when no physical evidence tied the defendant to the shooting and the state's case rested on the testimony of **three eyewitnesses**); *Lord v. Wood*, 184 F.3d 1083, 1094-96 (9th Cir.1999) (holding that counsel's failure to interview witnesses who had claimed to see the victim alive after the murder was prejudicial even though physical evidence tied the defendant to the murder and two inmates testified that the defendant had confessed to them); *Brown v. Myers*, 137 F.3d 1154, 1155–57 (9th Cir.1998) (holding that counsel's failure to

investigate and to locate and produce witnesses was prejudicial when **three witnesses** identified the defendant as the shooter).

The magistrate found that Yelp pages do not include a given company's roster of customers. Instead, at most, they identify only those who leave a review. And there is no reason to believe that each and every one of the victim's customers posted a review about his company or that any customer posted information on Yelp concerning the things that Petitioner had posted there. Dkt. 73 at 91. However, Czodor testified that Lilly was the person who reviewed his company on Yelp. Dkt. 4 at 61. He further testified that his customers on Yelp had notified him they had received links to YouTube video. Dkt. 4 at 92.

First, trial counsel knew that Czodor's testimony would be at the very heart of the prosecution's case. In other words, with no hard evidence on hand, the prosecutor clearly planned to use Czodor's testimony based on his credibility as powerful evidence. A reasonable defense lawyer would have attached a high importance to obtaining any evidence showing Czodor's dishonesty and inconsistent allegations, in order to anticipate and find ways of deflecting the prosecutor's arguments.

Second, the weak circumstantial evidence and inconsistency of his statements, raised a strong likelihood that the jury would reject Czodor's credibility had trial counsel effectively cross-examined Czodor regarding Lilly.

Third, trial counsel's actions and inactions were not the result of an informed tactical decision about how the lawyers' time would best be spent. Although trial counsel had ample time to realize that Czodor's credibility would be critical to the case, his failure to investigate would not necessarily have been deficient if it had resulted from the lawyers' careful exercise of judgment about how best to marshal his time and serve his client. But trial counsel did not ignore Lilly in order to spend his time on other crucial leads. Trial counsel did not determine not to investigate because it would necessarily divert him from other trial-preparation tasks he thought more promising. Rather, trial counsel's complete failure "was the result of inattention, not reasoned strategic judgment." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). As a result, his conduct fell below constitutionally required standards. See id., at 533 ("'[S]trategic choices made after less than

complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation'" (quoting *Strickland*, 466 U.S., at 690-691)).

In light of Czodor's testimony (Lilly reviewed his company on Yelp), trial counsel's failure to pursue Lilly's existence as an impeachment strategy weakened Petitioner's defense and was thus constitutionally inadequate. Lilly's absence from Czodor's Yelp page raises serious questions about the credibility of his testimony. Without examining Czodor's veracity about Lilly, trial counsel missed an opportunity to cast doubt on Czodor's entire testimony. The non-existence of Lilly suggests Czodor may have fabricated Lilly to corroborate his claims; thus, cross-examining him could have exposed inconsistencies and highlighted his motives to distort facts.

In the particular circumstances of this case, the attorneys' failure did not meet standards of "reasonable professional judgmen[t]." Id., at 691.

GROUND 24: DEFICIENT POLICE INVESTIGATION (Dkt. 73 at 92)

The magistrate concluded that Petitioner cites no evidence establishing or indicating that any of the evidence presented at trial was manipulated or that Czodor withheld exonerating video or photographic evidence. Dkt. 73 at 95. Petitioner's inability to cite evidence is the direct result of the police's failure to provide digital evidence, including all photos, screenshots and videos taken by Czodor.

The police's failure to preserve and provide complete digital evidence, including metadata, hinders Petitioner's ability to challenge the evidence and determine whether it has been manipulated. Print-outs without metadata offer no way to verify authenticity, especially in a case involving screenshots and other digital materials. The lack of digital evidence prevents Petitioner from determining the context, date, and authenticity of materials that Czodor provided, depriving her of this essential right.

While police have discretion in their investigatory methods, they are not relieved of their duty to gather potentially exculpatory evidence or to ensure a fair and impartial investigation. The U.S. Supreme Court has established that when police or prosecutors fail to preserve potentially exculpatory evidence, it may result in a due process violation if the evidence "might be expected to play a significant role in the suspect's defense." (*California v. Trombetta*, 467 U.S. 479, 480

(1984)). By failing to provide digital evidence and relying solely on Czodor's submissions, the police failed to fulfill their duty to evaluate and verify the credibility of his claims impartially. Here, the police's lack of independent investigation into Czodor's materials, coupled with their failure to provide digital evidence to Petitioner, signifies an investigative lapse that denied Petitioner a fair opportunity to challenge the evidence.

The magistrate found Petitioner provides no evidence to substantiate her claims concerning the police investigation of the crimes underlying her conviction. Dkt. 73 at 95. Again, Petitioner's inability to provide evidence is the direct result of the lack of police investigation. When there was no police investigation, of course there was no evidence of police investigation.

Trial counsel's closing argument relied on pointing out investigative shortcomings, highlighting the lack of a search warrant and digital analysis of Petitioner's electronic devices. However, trial counsel's argument was not supported by the actual metadata and digital records, leaving the jury with no concrete evidence to assess the police's investigative deficiencies.

The failure to collect digital evidence effectively forced trial counsel to make arguments unsupported by tangible data, undermining Petitioner's defense. The magistrate's assertion that trial counsel's closing argument was sufficient ignores the fact that counsel was deprived of essential digital evidence. Law enforcement's failure to collect and disclose digital evidence with metadata deprived Petitioner of the opportunity to challenge the credibility and integrity of the evidence against her. This failure directly impacted trial counsel's ability to construct a robust closing argument, thus infringing upon Petitioner's due process rights.

Ground 26 IMPROPER AMENDMENT OF THE COMPLAINT (Dkt. 73 at 96)

One day before the jury trial began on July 27, 2021 (Dkt. 3 at 29 and 230), the original complaint (filed 8/6/19) was amended (filed 7 /26/21) concerning Count 2 (Pen. Code, § 273.6). In the original complaint, the People alleged that petitioner violated a protective order by coming within 100 yards of the protected person. In the amended complaint, the People alleged that petitioner violated a protective order by failing "to deactivate website and created new websites."

Here, it's self-evident that the amendment shifts from a physical violation of proximity to an alleged online activity, which changes the nature of the defense entirely. The amendment here

requires different evidentiary proof, such as website creation records and online activity, which would not have been relevant to the original allegation.

This last-minute amendment, filed just one day before trial, essentially blindsided Petitioner, altering the defense strategy by requiring her to defend against online activity allegations rather than physical proximity violations.

The magistrate erred in finding that the amendment did not violate Petitioner's rights, particularly by improperly shifting the burden onto Petitioner to show prejudice, rather than requiring the prosecution to show good cause for the untimely amendment. Further, the magistrate's reliance on *Morrison v. Estelle*, 981 F.2d 425 (9th Cir. 1992) and *Calderon v. Prunty*, 59 F.3d 1005 (9th Cir. 1995) is misplaced, as the facts of this case are notably distinguishable.

In *Morrison*, the defendant was charged with murder and his counsel had two days to prepare for the felony-murder instructions given at trial. The Ninth Circuit found no due process violation because the felony-murder instruction was given in response to evidence presented at trial, and Morrison's counsel had sufficient time to prepare his closing argument on that theory. Unlike in *Morrison*, Petitioner had no advance notice of the theory change in her charge; instead, the change was made one day before trial, with no opportunity for her counsel to respond effectively.

Similarly, *Calderon* is distinguishable. In that case, the defendant was on notice of a lying-in-wait theory early in the proceedings, and the specific method of murder did not need to be alleged in the information for the defendant to be adequately informed of the charge. Unlike in *Calderon*, where the defendant had ample opportunity to address all aspects of the charge, here the amendment changed the entire nature of the alleged violation—from physical presence to online actions—without any advance notice or evidence suggesting Petitioner could reasonably anticipate such a shift. This substantive change required new types of evidence and entirely different defenses, fundamentally altering Petitioner's trial preparation.

The amendment, which altered the factual basis for the violation of a protective order from physical proximity to online conduct, is a substantive change that would require different evidentiary support. Courts have found that such last-minute amendments violate due process when they substantially prejudice the defendant's ability to prepare a defense. The amendment introduced

new elements that demanded distinct evidentiary preparation—specifically, records of website creation and online activities—rather than evidence of physical proximity. This shift deprived Petitioner of her ability to meaningfully defend against the charge in a timely and prepared manner, contravening due process standards as outlined in *People v. Pitts*, 223 Cal. App. 3d 606, 906-907 (1990) (the opportunity to prepare a meaningful defense would obviously be adversely affected, since the change in alleged acts would affect medical testimony, cross-examination of the alleged victim(s), etc).

The magistrate's finding that Petitioner should have requested a continuance to counter the effects of the last-minute amendment is legally unsound. Under both state and federal law, a defendant has a right to a speedy trial, and requiring Petitioner to waive this right by requesting a continuance to accommodate the prosecution's delay violates this principle. In *Barker v. Wingo*, 407 U.S. 514, 530 (1972), the U.S. Supreme Court held that the right to a speedy trial is fundamental and cannot be waived lightly or without careful consideration.

This principle was echoed in *People v. Martinez*, 22 Cal. 4th 750, 768 (2000), where the court ruled that the right to a speedy trial is essential to prevent unfair surprise or prejudice. By amending the complaint at such a late stage, the prosecution effectively forced Petitioner to choose between her right to a speedy trial and her right to adequate preparation. Such a choice violates her constitutional rights by shifting the burden of prosecutorial delay onto the defendant.

The magistrate's finding that trial counsel's withdrawal of the motion to preclude amendment demonstrated his "anticipation" of the amendment is factually incorrect and misrepresents the impact of the prosecution's actions on Petitioner's constitutional rights. In reality, trial counsel withdrew the motion only after the prosecution had already amended the complaint over his objection, thus leaving no procedural recourse to prevent the amendment.

The magistrate found Petitioner identifies no evidence that she might have presented or defense she might have pursued if the complaint had been amended earlier. Dkt. 73 at 99. However, Petitioner has a well-founded basis for asserting prejudice, as the timing of the amendment prevented her from gathering and presenting essential testimony that could have supported her defense.

Given that the amended charge related to online conduct, Petitioner's defense required a different approach than what would be relevant to a physical proximity violation. To challenge the allegations, it is self-evident Petitioner would likely have pursued testimony from witnesses who could speak to the veracity of Czodor's allegation. Preparation time is especially critical when defendants need to secure witness testimony and adapt their defense strategy. The last-minute amendment deprived Petitioner of this opportunity and impeded her ability to mount a viable defense. Altering the grounds of a charge close to trial could prevent a defendant from presenting a fair defense if it denies them access to crucial witnesses or evidence.

Ground 27 RIGHT TO A SPEEDY TRIAL (Dkt. 73 at 100)

The major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. *United States v. Marion*, 404 U.S. 307, 320 (1971). Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. *Id*.

The Supreme Court has held that a one-year post accusation delay will generally require a full review. *Doggett v. United States*, 505 U.S. 647, 652 n. 1, 112 S. Ct. 2686 (1992).

The magistrate found none of the delay was attributable to the prosecution. Dkt. 73 at 102. A delay of two years in a misdemeanor case is presumptively prejudicial and requires a strong justification from the prosecution, which was lacking here. See *Doggett*, 505 U.S. at 657, 112 S.Ct. 2686 (holding that "negligence [is not] automatically tolerable simply because the accused cannot demonstrate exactly how it prejudiced him").

In *Barker*, the Supreme Court noted, "The government, and for that matter, the trial court are not without responsibility for the expeditious trial of criminal cases. The burden for trial promptness is not solely upon the defense." *Barker v. Wingo* (1972) 407 U.S. 514, 527 n. 27, 92 S.Ct. 2182, 33 L.Ed.2d 101 (quoting *Hodges v. United States*, 408 F.2d 543, 551 (8th Cir. 1969)). In *Brillon*, the Supreme Court stated that "institutional problems" and other "[d]elay resulting from a systemic breakdown . . . could be charged to the State." *Vermont v. Brillon*, 556 U.S. 81, 92-94, 129 S. Ct. 1283, 173 L. Ed. 2d 231 (2009).

In addition to failing to actively push for trial by the prosecution, there is no record of any valid explanation for the two-year delay in Petitioner's case. Nothing in the record supports any good cause for the two-year delay. There was no discovery dispute or any pending motions over the course of two-year delay. The prosecution, the trial court and public defender failed to meet their duty to actively bring the case to trial, a systemic breakdown not attributable to Petitioner.

The magistrate found Petitioner waited until less than two weeks before trial to assert her right to a speedy trial. Dkt. 73 at 102. This delay in asserting her right was not due to any intentional waiver or neglect on Petitioner's part, but rather the direct result of inadequate representation by her public defender. Petitioner was "kept in the dark" regarding her right to a speedy trial and the true meaning of time waiver. Accordingly, she could not assert her right to a speedy trial without knowing the full legal ramifications of doing so.

The two-year delay in a misdemeanor case far exceed any reasonable timeframe which is a direct result of the trial court and the prosecution's negligence and the public defender's inadequate representation.

The magistrate's finding that *Mathews v. Eldridge*, 424 U.S. 319 (1976), does not apply to delays between arraignment and trial in criminal cases is legally unfounded. Dkt. 73 at 105. *Mathews*' three-part balancing test for determining whether due process rights have been violated has been cited and applied in a wide variety of contexts. See *Martinez v. McAleenan*, 385 F. Supp. 3d 349 (S.D.N.Y. 2019). Though *Barker* is the appropriate test for delay-related claims, the *Mathews* test provides a useful framework for analyzing delays and their due process implications. The *Mathews* balancing test, applied alongside or as a complement to the *Barker* test, helps highlight the procedural deficiencies that can arise from excessive delays between arraignment and trial.

GROUND TWENTY-EIGHT: DENIAL OF MOTION TO DISMISS (Dkt. 73 at 105)

The magistrate's finding that Petitioner's claim is not cognizable because it concerns state law is a misinterpretation of both federal and state legal standards, particularly when the claim involves a fundamental right, such as the right to a speedy trial under the Sixth Amendment.

The magistrate incorrectly frames Petitioner's claim as a state law procedural issue, ignoring

the constitutional implications. A court's refusal to consider a pretrial motion to dismiss based on a violation of the right to a speedy trial is inherently linked to constitutional concerns. The U.S. Supreme Court has held that the Sixth Amendment's speedy trial right is "fundamental" and thus subject to federal habeas review. The case of *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 (1972) underscores that the failure of the state court to provide relief for a speedy trial violation is cognizable on federal habeas review, as it raises constitutional due process questions.

Moreover, while the trial court may have claimed that Petitioner's motion was untimely or improperly noticed, the denial of a motion addressing a constitutional right—such as a motion to dismiss for violation of the right to a speedy trial—cannot be excused based solely on procedural technicalities. In *Zedner v. United States*, 547 U.S. 489, 509 (2006), the U.S. Supreme Court noted that the government, and by extension the courts, cannot ignore speedy trial claims on procedural grounds where there has been a clear constitutional violation. Therefore, even if Petitioner's motion was improperly noticed, the court had an obligation to substantively address the constitutional claim raised.

The magistrate appears to imply that because the trial court allowed Petitioner the opportunity to refile her motion, her right to raise the issue was not denied. However, this overlooks the essential point that a court's failure to timely address a properly raised constitutional concern, especially in cases involving the right to a speedy trial, itself constitutes a violation.

Even if the magistrate asserts that Petitioner cannot show that the trial court would have granted the motion, this reasoning is flawed because it shifts the burden away from the government to ensure a fair and speedy trial. Under *Barker v. Wingo*, the length of the delay itself can create a presumption of prejudice. When a defendant has been forced to endure an unreasonable delay, the presumption of prejudice weighs in favor of the defendant, and it is the prosecution's burden to justify the delay.

The magistrate concluded that the trial court found that Petitioner personally and repeatedly waived time. However, the trial court made no specific findings on the record to support any continuance, despite there was no discovery dispute. See *Zedner v. United States*, 126 S. Ct. 1976

(2006) (Alito, J.) (holding that the parties lack power to waive the public's interest in a speedy criminal trial).

The record also fails to establish that Petitioner voluntarily and knowingly waived her right to a speedy trial. Under both federal and California law, waivers of fundamental constitutional rights, including the right to a speedy trial, must be made voluntarily, knowingly, and intelligently. This requirement is underscored by the Supreme Court's decision in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), which held that any waiver of a constitutional right must be done "with sufficient awareness of the relevant circumstances and likely consequences."

Repeated continuances initiated by counsel do not inherently equate to a defendant's knowing and voluntary waiver. See Dkt. 33 at 109-110. With six different public defenders cycling through without conducting any substantive investigation, underscores significant issues with the adequacy of her legal representation. The record indicates that Petitioner's counsel failed to communicate basic court dates, leading to a bench warrant. Dkt. 3 at 21-22. The totality of circumstances, missed court date, lack of investigation, and attorney turnover without explanation suggest a breakdown in her legal representation and indicate professional neglect and disinterest. No evidence supports that Petitioner knowingly, voluntarily, and intelligently waived her right to a speedy trial because she received no benefit from the trial continuance.

GROUND 31: CUMULATIVE ERROR (Dkt. 73 at 106)

Contrary to the magistrate's conclusion, each of Petitioner's grounds for relief is meritorious as explained herein.

GROUND 32: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL (Dkt. 73 at 109)

As an initial matter, the magistrate erred in characterizing trial counsel's failure to provide explanation after being asked as Petitioner's unsuccessful attempt to obtain a declaration from trial counsel concerning his purported shortcomings. Dkt. 73 at 109.

Relying on *Dunn v. Reeves*, 594 U.S. 731 (2021), the magistrate reached the result that Petitioner's appellate counsel IAC claim fails for lack of evidence because it is not supported by a declaration from appellate counsel concerning his actions. However, *Reeves* is notably

distinguishable. Reeves' records suggested that his intelligence was below average, they also indicated that he was not intellectually disabled. Despite that, Reeves sought habeas relief due to his counsel's failure to hire an expert to develop additional evidence of intellectual disability. The court concluded that his determination not to offer testimony or other evidence from his lawyers is particularly signifcant given the "range of possible reasons [Reeves'] counsel may have had for proceeding as they did." The court explained that Reeves is not a case in which a lawyer "failed to uncover and present any evidence of [Reeves'] mental health or mental impairment, [or] his family background." The court found counsel's initial enthusiasm to collect Reeves' records and obtain funding hardly indicates professional neglect and disinterest. *Id*. at 740.

First, *Reeves* concerned trial counsel's strategic decision-making, where the Court noted that Reeves' attorneys had gathered extensive records and funding and had presented mitigating evidence. In that context, the failure to present additional expert testimony on intellectual disability was seen as a reasonable strategy given the range of mitigating evidence already available.

In contrast, appellate counsel in this case did not exercise a similarly strategic choice among potential claims. Petitioner is not asserting a complex trial strategy where multiple plausible choices exist, but rather is raising an appeal where failure to address potentially meritorious issues suggests a lack of diligence, rather than a strategic decision.

Additionally, unlike *Reeves*, the appellate counsel here did not attempt to investigate, present, or argue any potentially exculpatory issues. *Reeves* does not control here because the nature of the decision-making in the appellate context differs significantly. When an attorney fails to raise claims that have a reasonable probability of success, the presumption of competence is weaker.

The magistrate's conclusion that Petitioner "does not identify any nonfrivolous claim that counsel failed to raise on appeal" is factually incorrect. Petitioner's claims – that do not require evidence outside records on appeal – in this habeas petition are self-evident that they could have been raised on direct appeal and do not require additional identification.

Further, any claims here that were subject to dismissal due to procedural bar on grounds that they should have been raised on appeal imply that these claims are based on the record available during appellate proceedings, refuting the magistrate's assertion that no identifiable claims exist.

The magistrate found appellate Counsel could not have raised the ineffective-assistance-of-trial counsel (IATC) claims on direct appeal because in California such claims must generally be raised on habeas review, not on appeal. Dkt. 73 at 110. The general rule articulated in *People v. Mendoza Tello*, 15 Cal. 4th 264, 266-67 (1997), is not an absolute bar; rather, it emphasizes the necessity of additional fact-finding in many, but not all, IATC cases.

GROUND 35: INSTRUCTIONAL ERROR (Dkt. 73 at 114)

The magistrate erred in concluding that the trial court's failure to provide the correct instruction to the jury on the amended charge was harmless, relying on her version of "overwhelming evidence" presented in arguments that did not conform to the jury instructions. Dkt. 73 at 117.

While the magistrate points to the prosecutor's and defense counsel's arguments focusing on the amended charge, arguments by counsel cannot cure instructional errors. It is well established that jury instructions, not attorney statements, define the law for the jury to follow. In *Boyde v. California*, 494 U.S. 370 (1990), the Supreme Court held that instructions, rather than arguments, guide the jury's understanding of the applicable law. Additionally, the trial court's instructions specifically directed the jury to disregard any conflicts between counsel's statements and the court's instructions. The trial court explicitly instructed the jury "If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." Dkt. 4 at 146. The presumption here is that the jury followed the court's directive, focusing solely on the instruction related to contact and messages rather than any discussions of online conduct. The closing arguments is insufficient to cure instructional defects.

The magistrate concluded that Czodor testified that after the family court issued the protective order, Petitioner posted his private photographs, created fake social media accounts in his name, and posted defamatory and private things about him – including his home address and phone number – on other "cheater" websites. First, the magistrate's analysis was legally flawed because she improperly focused on the issuance of the protective order rather than on the date when Petitioner was served with the order and became aware of its terms. Under both California law and federal due process requirements, Petitioner could not have violated the protective order unless she

had actual notice of it at the time of the alleged conduct. No evidence showed any timestamp of any alleged postings. Consequently, if Petitioner's alleged posts regarding Czodor were made even an hour before she received the family court order, she cannot be held liable for actions taken before being formally notified, even if both events occurred on the same day.

Second, Czodor's testimony confirmed that the printed representation of all "digital evidence" presented at trial—including social media accounts, defamatory posts, and private photographs—was entirely self-produced and provided by Czodor, without any independent third-party verification or forensic analysis. Even the police officer never saw any alleged postings. Dkt. 6 at 178.

The reliance on unverified, self-serving print-outs, combined with the State's intentional failure to collect forensic evidence and withholding of Czodor's inconsistent statements and dishonesty history, suggests that the State may have engaged in a strategic tactic designed to obscure the truth and deny Petitioner a fair trial.

In criminal trials, prejudicial instructional errors can violate due process when they create a reasonable likelihood that the jury applied the instructions incorrectly, leading to an unfair trial outcome. Incorrect instructions or omissions that mislead the jury on key elements of the offense can deprive a defendant of a fair trial. Here, the trial court's instruction described the written order that the defendant no contact, send any messages to, follow, or disturb the peace of the protected person, rather than the amended charge of failing to remove online posts and websites. This significant deviation misled the jury, especially given the confusing and contradictory nature of evidence presented. The risk of prejudice was high, as jurors may have convicted Petitioner based on conduct unrelated to the actual amended charge, raising substantial due process concerns.

The magistrate's reliance on the purportedly "overwhelming" evidence to assert that Petitioner suffered no prejudice is misplaced. A jury is presumed to follow its instructions. *Richardson v. Marsh*, 481 U. S. 200, 211 (1987). Here, the jurors were instructed to assess different conduct than what was alleged in the amended charge, creating a risk of confusion. The fact that both the prosecutor and defense counsel referenced the amended charge in closing arguments does

not override the explicit jury instruction from the court, as it is presumed that jurors follow judicial instructions over attorney arguments (see *Weeks v. Angelone*, 528 U.S. 225, 234 (2000)).

PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING (Dkt. 73 at 119)

In *Schlup v. Delo*, 513 U.S. 298, 327-332 (1995), the Supreme Court held that to satisfy Carrier's "actual innocence" standard, a petitioner must show that, in light of the new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. The focus on actual innocence means that a district court is not bound by the admissibility rules that would govern at trial, but may consider the probative force of relevant evidence that was either wrongly excluded or unavailable at trial. The district court must make a probabilistic determination about what reasonable, properly instructed jurors would do, and it is presumed that a reasonable juror would consider fairly all of the evidence presented and would conscientiously obey the trial court's instructions requiring proof beyond a reasonable doubt. The *Carrier* standard, although requiring a substantial showing, is by no means equivalent to the standard governing review of insufficient evidence claims. *Jackson v. Virginia*, 443 U. S. 307, distinguished. In applying the *Carrier* standard to a petitioner's request for an evidentiary hearing, the District Court must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial. The court is not required to test the new evidence by a standard appropriate for deciding a motion for summary judgment, but may consider how the submission's timing and the affiants' likely credibility bear on the probable reliability of that evidence.

The subsequent acquittal on identical evidence in Petitioner's second trial undermines confidence in the outcome of the initial trial and serves as compelling evidence of innocence, supporting her claim that constitutional error led to her prior conviction. Petitioner has met her burden to demonstrate no reasonable juror would find her guilty beyond a reasonable doubt. See *House v. Bell*, 547 U.S. 518, 536-540 (2006) (rather than requiring absolute certainty about guilt or innocence, a petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt.) The second jury's determination of her acquittal, despite awareness of her prior convictions,

highlights flaws in the first trial's process that could have been influenced by constitutional errors, meriting review of the additional trial records. Therefore, Petitioner's request to expand the record should have been granted to prevent a miscarriage of justice. See *Coleman v. Hardy*, 628 F.3d 314, 322-23 (7th Cir. 2010) (evidentiary hearing warranted to develop evidence that, "but for constitutional error, no reasonable factfinder would have found [petitioner] guilty"); *Dugas v. Coplan*, 506 F.3d 1, 7 n.4 (1st Cir. 2007) (evidentiary hearing not barred because lack of factual development on petitioner's prejudice issue due to state court's decision not to reach issue, not petitioner's lack of diligence); *Garner v. Lee*, 908 F.3d 845, 860 (2d Cir. 2018) (federal evidentiary hearing warranted when state court did not address merits of claim); *Lambert v. Warden Greene SCI*, 861 F.3d 459, 472-73 (3d Cir. 2017) (same); *Lee v. Kink*, 922 F.3d 772, 774-75 (7th Cir. 2019) (federal evidentiary hearing warranted when state made unreasonable factual determination).

In addition, in denying Petitioner's request for discovery and an evidentiary hearing, the magistrate erred by depriving her of essential procedural rights necessary to substantiate her claim of ineffective assistance of counsel. As outlined by the Ninth Circuit in *Detrich v. Ryan*, 740 F.3d 1237, 1246-47 (9th Cir. 2013), when assessing ineffective assistance claims, courts must often inquire directly into an attorney's reasoning for particular strategic or tactical choices.

Without allowing Petitioner to present evidence in a hearing, the court has effectively precluded a thorough examination of whether her trial counsel's conduct impacted the trial's outcome, a direct violation of her right to counsel. By refusing Petitioner's requests, the magistrate has denied Petitioner the opportunity to establish her claims fully, infringing upon her fundamental due process rights.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that the Court not adopt the Report and Recommendations. In the alternative, Petitioner has made a showing that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, a certificate of appealability should be granted.

DATED: 10/31/2024

/s/ Xingfei Luo
In Pro Per

CERTIFICATE OF SERVICE

I declare that I electronically filed the forgoing with the United States District Court, Central District of California. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

In addition, I electronically served the forgoing to the following email address: michael.butera@doj.ca.gov

I declare under penalty of perjury under the laws of the State of California and United States of America that the foregoing is true and correct.

Executed on October 31, 2024

/s/ XINGFEI LUO

XINGFEI LUO, In Pro Per